No. 99-323-CFY Title: Edward Hanousek, Jr., Petitioner
v.
United States

Docketed: August 23, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 23 1999	Petition for writ of certiorari filed. (Response due October 22, 1999)
	Sep 16 1999	Order extending time to file response to petition until October 22, 1999.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

EDWARD HANOUSEK, JR., Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Clean Water Act a "public welfare" statute (as the Ninth, Eighth and Second Circuits have ruled, but contrary to the rulings of the Fifth Circuit and arguably the Fourth Circuit) so as to justify criminal conviction and imprisonment, without proof of mens rea, for otherwise innocent conduct?

2. Does the Due Process Clause restrict eliminating mens rea for offenses punishable by significant terms of imprisonment of one year or more?

3. Does the unmodified word "negligently" in § 1319(c)(1)(A) of the Clean Water Act, a criminal statute that provides for both misdemeanor and felony penalties, mean negligence in an ordinary civil tort sense or negligence in an aggravated criminal sense?

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PETITION FOR WRIT OF CERTIORARI

Edward Hanousek, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 176 F.3d 1116 (9th Cir. 1999). The opinion is reproduced in Appendix A. The oral ruling of the United States District Court for the District of Alaska is unreported. It is reproduced in Appendix B.

JURISDICTION

The Ninth Circuit issued its opinion on March 19, 1999. On April 1, 1999, Hanousek timely filed a Petition for Rehearing *En Banc*, which the Ninth Circuit denied on June 7, 1999. The order denying rehearing *en banc* is reproduced in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V
Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Clean Water Act

33 U.S.C. § 1319(c)(1) (1994)
33 U.S.C. §§ 1321(a)(1), (b)(3) & (b)(4) (1994)
33 U.S.C. § 1362(6) (1994)

These statutes are reproduced in Appendix D.

Code of Federal Regulations

40 C.F.R. §§ 110.1 & 110.3 (1998)

These regulations are reproduced in Appendix E.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction.

This petition concerns a criminal prosecution under federal law. The district court had jurisdiction because offenses against the United States were charged. 18 U.S.C. § 3231 (1994).

2. Factual Background.

This case arises out of an accidental spill of stove oil from a pipeline running alongside the White Pass & Yukon Railroad. Petitioner Edward Hanousek Jr. ***did not*** spill the stove oil, nor was he present when the spill occurred. Nevertheless, Hanousek was charged with "negligently" violating the Clean Water Act. He was convicted under a civil tort standard of negligence and sentenced to one year of confinement in correctional facilities.

The White Pass & Yukon Railroad connects Skagway, Alaska with Whitehorse, Yukon Territory and is owned by the Pacific & Arctic Railway and Navigation Company ("PARN"). In 1994, PARN began a realignment project to straighten a curve in the railroad track in a location known as "6-mile." The 6-mile project involved blasting rock outcroppings and using a backhoe to load the fractured rock into train cars for disposal. PARN hired Hunz & Hunz, an independent contractor, to do the job.

When the work started at the 6-mile site, Hunz & Hunz covered the petroleum products pipeline[1] adjacent to the tracks with railroad ties, sand and ballast. Hunz & Hunz also created a work platform of sand and gravel from which its backhoe operated. The work platform protected the pipeline from damage by providing between six and ten feet of cover over the pipeline. (CR 306, RT at 3-10; CR 303, RT at 15-9) Hunz & Hunz's backhoe operators were experienced in working around pipelines. (CR 306, RT at 3-4; CR 303, RT at 15-4) They testified that they knew where the pipeline was located and they knew they had to be careful to avoid damaging it. (CR 300, RT at 2-7, 2-25; CR 306, RT at 3-5, 3-6; CR 303, RT at 15-5, 15-8)

After Hunz & Hunz's work was underway, PARN hired Hanousek as roadmaster for the railroad. Hanousek's duties included overseeing the 6-mile project.

On the evening of October 1, 1994, Shane Thoe, a Hunz & Hunz employee, used the backhoe on the work platform to load rocks into a train. Once the train cars were loaded, the train departed and Thoe was alone at the site. Thoe noticed that some rocks had fallen and been pushed down the track by the train. The rocks were located outside the current work area, in a place where the work had been completed weeks earlier. (CR 306, RT at 3-21; CR 303, RT at 15-10) Because the work had been finished in the location where the rocks were, the protective cover over the pipeline there had been removed. (CR 303, RT at 15-12) The backhoe had not operated in the area for a couple of weeks. (CR 303, RT at 15-12)

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[1] Pacific & Arctic Pipeline, Inc. ("PAPI"), a sister company to PARN, owned and operated the pipeline. The United States Army originally installed the pipeline in the 1940s. At the 6-mile site, the Army installed the pipeline just below the surface of the ground, alongside the railroad tracks, and a stone's throw from the Skagway River.

Thoe decided to move the rocks with the backhoe instead of by hand. Thoe drove the backhoe off the work platform and into the unprotected area. He then began using the backhoe bucket to "sweep" the rocks away from the tracks. As Thoe did so, the backhoe bucket struck the pipeline below the surface of the ground and caused a crack. Stove oil (a light grade of diesel fuel) that the pipeline company was pumping from Skagway to Whitehorse that evening sprayed from the cracked pipeline.

Thoe immediately reported the accident by radio and the pipeline was shut down within a few minutes. (CR 300, RT at 2-13; CR 301, RT at 9-31; CR 257, RT at 2-21, 2-22, 2-47) Nonetheless, stove oil that escaped from the pipeline eventually seeped through the rail bed and into the nearby Skagway River over the course of the next few days. Witnesses reported seeing sheens of oil in the Skagway River after the accident.

Thoe and his employer, Dave Hunz, both admitted at trial that the accident was caused by Thoe's error. (CR 302, RT at 10-20, 10-21; CR 306, RT at 3-25) Hunz testified that Thoe should not have taken the backhoe off of the work platform. Hunz said: "Stay up on the work pad; that's where we're – we're supposed to be working off of." (CR 302, RT at 10-49) The other Hunz & Hunz backhoe operator testified that he "hardly ever – never" took the backhoe off the work platform. (CR 303, RT at 15-10)

Hanousek was not present at the 6-mile site at the time of the accident and he had no involvement in Thoe's actions that night. Hanousek was off duty and at home when Thoe's accident occurred. (CR 350, RT at 12-18, 12-19; CR 384, RT at 3-93, 3-94, 3-109)

3. Proceedings Below.

The government charged Hanousek with negligently discharging a harmful quantity of oil into the navigable waters of the United States in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3) (1994). At trial, Hanousek asked the district court to instruct the jury that mens rea in the form of criminal negligence was a necessary element of the crime. Hanousek's proposed instruction defined criminal negligence as a "gross deviation from the standard of care that a reasonable person would observe in the situation." Hanousek's proposed instruction was taken from the Model Penal Code's definition of the mental state of acting "negligently." 1 Model Penal Code § 2.02(2)(d) (1985).

The district court refused Hanousek's request and ruled that negligence in a civil tort sense was sufficient to establish the crime. The district court instructed the jury that negligence meant "the failure to use reasonable care."

Applying the civil negligence instruction, the jury convicted Hanousek of negligent discharge of oil. The district court fined Hanousek $5,000 and sentenced him to twelve months of confinement in correctional facilities (six months in prison, six months in a halfway house), to be followed by six months of supervised release.

Hanousek appealed to the Ninth Circuit, which affirmed the conviction. The Ninth Circuit ignored Hanousek's argument that the word "negligently" in the Clean Water Act had to be interpreted in light of the criminal context of the statute in which it appeared. The Ninth Circuit concluded that "negligently" in the statute meant only negligence in a civil tort sense was needed to impose criminal liability. 176 F.3d at 1120-21. The Ninth Circuit also rejected Hanousek's argument that the use of a civil standard to impose criminal responsibility violated

due process. The court of appeals said the Clean Water Act was a "public welfare" statute so that due process was no impediment to a civil tort standard being used to establish criminal responsibility. 176 F.3d at 1121-22.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The circuits are divided on the question of whether the Clean Water Act creates "public welfare" offenses. The Second, Eighth and Ninth Circuits have ruled that the Act is a "public welfare" statute under which the traditional mens rea requirement of criminal law may be eliminated. The Fifth Circuit has ruled to the contrary. The Fourth Circuit has said that the Clean Water Act is a "public welfare" statute in some applications, but it has nevertheless required mens rea as to each essential element of the substantive offense charged under the Act.

The question of whether the Clean Water Act is a "public welfare" statute is one of national significance. The number of criminal prosecutions under the Act, as well as under similar federal environmental statutes, has increased dramatically in recent years. Resolving the conflict in the circuits is especially important because of the extraordinary breadth of the Clean Water Act. The Act extends to the general public and regulates a broad class of items, including ones used in complete innocence by ordinary citizens.

This Court has recognized that eliminating mens rea as an essential element of a crime can violate due process. The exact parameters of due process as it relates to mens rea, however, are ill-defined. The lack of guidance on the issue has lead to conflicting decisions in the lower courts. The Court should provide the necessary guidance and address the restrictions that due process places on

dispensing with criminal intent. In particular, this case warrants consideration of the severity of the penalty that due process permits to be imposed for a non-mens rea offense.

Section 1319(c)(1) of the Clean Water Act makes it a criminal offense punishable by both misdemeanor and felony penalties to "negligently" violate the Act. The Ninth Circuit's interpretation of "negligently" conflicts with decisions of state courts of the last resort as well as the rules of statutory construction. The Ninth Circuit's interpretation will create difficulty in the proper application of other federal criminal statutes that use the undefined word "negligently." Imposing misdemeanor and felony penalties, including lengthy prison terms, based on mere civil negligence also raises fundamental policy questions about criminalizing morally innocent conduct.

I.

THE DECISIONS OF THE COURTS OF APPEALS CONFLICT ON THE IMPORTANT ISSUE OF WHETHER THE CLEAN WATER ACT IS A "PUBLIC WELFARE" STATUTE ELIMINATING MENS REA AS A REQUIREMENT FOR CRIMINAL CONVICTIONS.

This Court has long held that mens rea is ordinarily an essential element to a crime. *Morissette v. United States*, 342 U.S. 246, 250 (1951). "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisdiction." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). Underlying the Court's insistence on mens rea is the concern that its elimination would "criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985). Mens rea serves to avoid

subjecting "law abiding, well-intentioned citizens" to possibly lengthy prison terms. *Staples v. United States*, 511 U.S. 600, 615 (1994). *Accord United States v. X-Citement Video*, 513 U.S. 64, 68-73 (1994).

The Court has approved eliminating mens rea only in cases involving so-called "public welfare" or "regulatory" offenses. *Staples v. United States*, 511 U.S. 600, 606 (1994). "Public welfare" or "regulatory" offenses are recognized in "limited circumstances." *Id.* at 607. Typically, the "cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items." *Id.* As this Court explained in *Staples*, "as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' . . . he should be alerted to the probability of strict regulation." *Id.* (citations omitted).

The mere fact that an item is "dangerous" in a general sense, however, is not enough to support a "public welfare" offense or to permit the elimination of mens rea. "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. For instance, the Court in *Staples* acknowledged that guns are dangerous, but it pointed out that there "is a long tradition of widespread lawful gun ownership by individuals in this country." *Id.* at 610. The Court said that because guns have been accepted as lawful possessions their "destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation" so as to justify the elimination of mens rea as a requirement for conviction under the National Firearms Act, 26 U.S.C. § 5861(d). *Id.* at 612.

In this case, the Ninth Circuit relied on the doctrine of "public welfare" offenses in ruling that mens rea was not

required to convict Hanousek under the Clean Water Act – mere civil negligence was enough.[2] The court based its decision on the earlier Ninth Circuit case of *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied sub nom., Mariani v. United States*, 513 U.S. 1128 (1995). In *Weitzenhoff*, the Ninth Circuit dealt with a criminal prosecution against sewage treatment plant workers who had dumped sewage sludge into the ocean at night. The *Weitzenhoff* court concluded, in very general terms, that the "criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution . . . and as such fall within the category of public welfare legislation." 35 F.3d at 1286.

In *Hanousek*, the Ninth Circuit accepted *Weitzenhoff* as settling the issue of whether the Clean Water Act as a whole was a "public welfare" statute. The *Hanousek* opinion simply cited *Weitzenhoff* and declared that "[t]he criminal provisions of the CWA constitute public welfare legislation." 176 F.3d at 1121.

Two other courts of appeals have similarly accepted the broad conclusion that the Clean Water Act is a "public welfare" statute. In *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996), the Second Circuit said that since a *majority* of the substances treated as pollutants under the Clean Water Act would alert an ordinary user "to the likelihood of stringent regulation" mens rea could be relaxed. 53 F.3d at 540. Similarly, the Eighth Circuit in *United States v. Sinskey*, 119

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[2] At common law mere civil negligence was not sufficient to satisfy mens rea. An aggravated form of negligence was required. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 842 (3d ed. 1982) ("Common sense compels the conclusion that there may be a grade or degree of fault sufficient to call for payment of damages in a civil suit, but quite insufficient to authorize criminal punishment, and this is exactly the result reached by the common law.")

F.3d 712, 716 (8th Cir. 1997) said the Clean Water Act established "public welfare" offenses because it covered "obnoxious waste materials," such as the byproducts of slaughtered animals at issue in that case.

In contrast, the Fifth Circuit in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) refused to classify the Clean Water Act as a "public welfare" statute for which strict criminal liability may be imposed. The defendant in *Ahmad* pumped gasoline from storage tanks on his property into a city sewer system. He claimed that he thought he was pumping water. The Fifth Circuit carefully followed this Court's decision in *Staples* and noted that "the key to the public welfare offense analysis is whether 'dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct.'" 101 F.3d at 391. Since the defendant's conduct was traditionally lawful, mens rea was required for a conviction. *Id.* The fact that gasoline was involved made no difference even though gasoline is obviously a dangerous commodity. The Fifth Circuit noted that, "[t]hough gasoline is a 'potentially harmful or injurious item,' it is certainly no more so than are [the] machineguns" at issue in *Staples*. *Id.*

See also United States v. Wilson, 133 F.3d 251, 263-65 (4th Cir. 1997) (referring to Clean Water Act as a public welfare statute "in some applications," but nevertheless requiring mens rea as to "each essential element of the substantive offense").

This conflict between the courts of appeals needs to be resolved. The issue of whether Clean Water Act can be properly classified as establishing "public welfare" offenses is one of national significance. Criminal prosecutions under the Clean Water Act and the other federal environmental laws have increased remarkably in recent

years. The Environmental Protection Agency's referrals of criminal cases to the Justice Department "have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997." Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Envtl. L. & Pol'y 39, 40 (1999). "Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison." *Id.* The Clean Water Act accounts for 25 percent of all the prosecutions under the federal environmental laws. *Id.* at 42. Given the increasing number of criminal cases, the need for a definitive ruling on whether the Clean Water Act encompasses "public welfare" offenses is acute.

Moreover, addressing whether the Clean Water Act embodies "public welfare" offenses will provide important guidance to the lower courts in cases arising under other federal environmental statutes. The criminal provisions of the principal federal environmental laws share basic similarities. *See* Clean Water Act, 33 U.S.C. § 1319(c) (1994); Clean Air Act, 42 U.S.C. § 7413(c) (1994); Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d) (1994). This Court's decision on "public welfare" offenses in the context of the Clean Water Act will therefore clarify the law for cases arising under other statutes. Guidance from this Court on the mens rea requirements of the federal environmental laws is especially important because Congress failed to provide any. "In environmental law . . . Congress avoided addressing at all what it meant by the mens rea requirements it enacted." Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L. J. 2407, 2453-54 (1995).

A definitive ruling on the correct application of the Clean Water Act is also needed because of the extraordinary breadth of the Act. "This statute has tremendous sweep. . . . Much more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting on denial of rehearing *en banc*). The Clean Water Act does not just govern a limited class of potential defendants in regulated industries who might be presumed to know the requirements of the law. The Clean Water Act literally extends to every member of the public. Nor is the Clean Water Act restricted to obvious noxious pollutants such as toxic waste materials that are generally understood as being subject to governmental regulation. The Clean Water Act regulates a wide variety of common items that ordinary citizens handle in their everyday lives.[3]

Oil and petroleum products are covered by the Act. 33 U.S.C. § 1321(a)(1) (1994). Gasoline, kerosene, diesel fuel, motor oil, grease, lubricants, and a myriad of other petroleum products are all in everyday use by ordinary citizens. Under the Ninth Circuit's decision, if a simple accident occurs and so much as a few drops of these common products find their way into a waterway, criminal penalties may be imposed. The negligent discharge of a "harmful" quantity of oil into a waterway is a criminal offense under the Act (33 U.S.C. § 1321(b)(3) (1994)), and

[3] The definition of "pollutant" in the Clean Water Act is exceedingly broad and it includes "garbage, . . . biological materials, . . . heat, . . . rock, sand . . . ." 33 U.S.C. § 1362(6). Under this definition "skipping a stone into a lake" or "pouring hot, stale coffee down a drain" is a violation of the Act. *Weitzenhoff*, 35 F.3d at 1298 (Kleinfeld, J., dissenting on denial of rehearing *en banc*). "Hazardous substances" covered by the Act include items used by a wide cross-section of the public, *e.g.*, chlorine, formaldehyde, sodium hypochlorite (bleach). 40 C.F.R. § 116.4 (1998).

the accompanying regulations define a "harmful" quantity of oil as including even just "a film or sheen upon or discoloration of the surface of the water." 40 C.F.R. § 110.3 (1998).

Thus, a recreational fisherman who inadvertently spills a few ounces of fuel while filling the gas tank of his boat will be a federal criminal and may be imprisoned. A motorist on her way to work who negligently causes an automobile accident that results in gasoline or motor oil trickling into navigable waters abutting the highway will be subject to federal prosecution. And pity the productive citizens like Ed Hanousek whose jobs even temporarily require working, or overseeing others who work, with machines somewhere in the area of federal waters. If an on-the-job accident occurs that results in just a "film or sheen" of petroleum on the water, these productive citizens will face imprisonment and the lifetime stigma of being criminals.

Given the broad scope of the Clean Water Act, the Ninth Circuit's blanket pronouncement that the Act as a whole is a "public welfare" statute was erroneous.[4] Because the Act covers "usually licit and blameless conduct" that would not alert an individual "to the probability of strict regulation" *Staples*, 511 U.S. at 613 & 616, mens rea cannot be eliminated.

In view of the breadth of the Clean Water Act and its application to ordinary citizens from every walk of life,

[4] *Staples* teaches that the "public welfare" offense analysis turns on "the general class of items" regulated by the statute as a whole, not a "fluid" case-by-case examination of the circumstances of the particular defendant in each case. 511 U.S. at 612 n.6. The Ninth Circuit was out of step with *Staples* on this point. The Ninth Circuit ruled that the entire Clean Water Act constitutes a "public welfare" statute based only on the particular conduct of the defendants in the *Weitzenhoff* case. *Weitzenhoff*, 35 F.3d at 1285-86.

this Court should resolve the question of whether the Act embodies "public welfare" offenses for which mens rea may be eliminated. The issue is one of exceptional importance because hanging in the balance is "a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting on denial of rehearing *en banc*).

II.

THE COURT SHOULD ADDRESS THE DUE PROCESS LIMITATIONS ON DISPENSING WITH MENS REA FOR OFFENSES THAT ARE PUNISHABLE BY SIGNIFICANT PRISON TERMS.

The extent to which mens rea is a requirement of due process is an important constitutional issue that this Court has only rarely touched on and never fully addressed. Accepting Hanousek's petition will give the Court the opportunity to speak to this fundamental question of constitutional law.

The Court has previously recognized that there are due process limitations on a legislature's ability to eliminate mens rea in defining a crime. In *Lambert v. California*, 355 U.S. 225 (1957) the Court held that due process was violated when California convicted a woman of failing to register as a felon without proof of mens rea.

Furthermore, the Court has often looked to historical practice under the common law to determine the requirements of constitutional due process. *E.g.*, *Montana v. Egelhoff*, 518 U.S. 37, 44-48 (1996); *Griffin v. United States*, 502 U.S. 46, 49-51 (1991). As noted previously, the common law did not permit a defendant to be convicted and imprisoned without proof of mens rea. *Morissette*, 342 U.S. at 250. This historical practice reaffirms the conclusion that "the mens rea principle must be given

constitutional effect." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 515 (E.D.N.Y. 1993) (Weinstein, J.).

The exact parameters of due process as it relates to mens rea are exceptionally ill-defined. The most-widely cited decision that discusses mens rea in the context of due process is an opinion authored by Justice Blackmun when he was a judge of the Eighth Circuit. Judge Blackmun wrote:

> where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

The generalized listing of vague factors in *Holdridge* provides little practical guidance for the lower courts. The lack of guidance has lead to conflicting decisions. *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (Migratory Bird Treaty Act violates due process in defining felony without requiring mens rea); *United States v. Engler*, 806 F.2d 425, 434-35 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987) (felony provisions of Migratory Bird Treaty Act do not violate due process despite lack of mens rea).

This petition presents the Court with the opportunity to flesh out the constitutional scope of mens rea and to thereby set at least some parameters for the restrictions that due process places on dispensing with criminal intent. Because Hanousek was engaged in a long-standing legal activity and not alerted to the probability of strict regulation, due process should not permit criminal sanctions to be imposed upon him for conduct amounting to no more than civil negligence. Doing so would be recognizing "a rigorous form of strict liability" that this Court has indicated is improper. *Staples*, 511 U.S. at 607 n.3.

Moreover, the constraints that due process places on severe penalties being imposed for non-mens rea crimes is directly implicated in this case. The Court has repeatedly mentioned that the severity of the penalty has an important correlation to mens rea, but it has never decided what that correlation may be. In *Staples* the Court observed that "in a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no mens rea would seem incongruous." *Staples*, 511 U.S. at 617. *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978) (citing Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933) for the proposition that "strict liability [is] generally inappropriate when offense punishable by imprisonment").

Hanousek was sentenced to one year of confinement in correctional facilities, the maximum period of time possible for a first offender, even though his

conduct was only blameworthy in a civil tort sense.[5] Hanousek's punishment is "incongruous" with our system of criminal law, for which mens rea has always been a polestar. The penalty imposed on Hanousek was not "relatively small," and it therefore begs the question of how severe the penalties for non-mens rea offenses can be before due process is violated. In the absence of a criminal mental state, one year of confinement in correctional facilities for a simple accident someone else caused conflicts with the fundamental conceptions of fairness that due process embodies.

III.

THE COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER THE UNDEFINED WORD "NEGLIGENTLY" IN A CRIMINAL STATUTE MEANS CIVIL OR CRIMINAL NEGLIGENCE.

Hanousek was convicted under § 1391(c)(1) of the Clean Water Act, which subjects one who "negligently violates" enumerated provisions of the Act to fines up to $25,000 per day and imprisonment up to one year. 33 U.S.C. § 1319(c)(1) (1994). The same section of the statute makes a second violation a felony that is punishable by fines up to $50,000 per day and imprisonment up to two years. *Id.*

The statute does not define what is meant by the word "negligently." In the courts below, Hanousek argued that the word "negligently" had to be interpreted in light of

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[5] The sentencing guideline the district court followed in sentencing Hanousek assumed "knowing conduct." U.S.S.G. § 2Q1.3, appl. note 3. Although the sentencing guideline authorized a downward departure for negligent conduct (*id.*), the district court ignored Hanousek's request for a downward departure on this basis.

the criminal context in which it appeared. "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Hanousek also pointed to a number of aids to statutory construction that supported his interpretation, including:

(1) the rule that statutes should be construed in light of the common law (*Staples*, 511 U.S. at 605);

(2) the overall structure of the Clean Water Act with its hierarchy of administrative, civil and criminal penalties (33 U.S.C. §§ 1319(c), (d), (g) & §§ 1321(b)(6)-(8) (1994)), which suggests that civil standards should govern civil penalties and more culpable conduct is necessary for criminal penalties (*United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978));

(3) the need to construe the statute to avoid unreasonable results, including the result of criminalizing a broad range of apparently innocent conduct (*United States v. X-Citement Video*, 513 U.S. 64, 69-71 (1994));

(4) the rule of lenity, which requires an ambiguity in a criminal statute to be construed in favor of the accused (*Liparota v. United States*, 471 U.S. 419, 427 (1985)); and

(5) the rule that statutes should be construed, whenever possible, to avoid raising substantial questions of constitutionality (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 629 (1993)).

The Ninth Circuit ignored the criminal context of § 1319(c)(1) and ignored or dismissed these aids to statutory construction. Instead, the Ninth Circuit summarily concluded that the plain meaning of the word "negligently" was civil negligence. 176 F.3d at 1120. The Ninth Circuit based its interpretation on a college dictionary and the

definition of "negligence" in Black's Law Dictionary, which is derived from civil cases. *Id.* at 1120-21.[6]

This Court has never previously considered the meaning of "negligence" in the context of a criminal statute. The Ninth Circuit's decision, however, conflicts with several state court decisions that use the traditional men rea requirement to interpret the undefined word "negligence" in a criminal statute. "We interpret the mens rea element of negligence . . . to require a showing of criminal negligence instead of ordinary civil negligence. . . . We do not find the absence of definition of negligence in the statute indicative of legislative intent." *Santillanes v. State*, 849 P.2d 358, 365 (N.M. 1993). *Accord State v. Ritchie*, 590 So.2d 1139, 1149 (La. 1991); *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989). The authoritative Model Penal Code is in full agreement with this view. 1 Model Penal Code § 2.02(2)(d) (1985). This Court has relied on the Model Penal Code in interpreting the mens rea requirements of federal statutes. *E.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

Allowing the Ninth Circuit's decision to stand will lead to difficulty with the proper interpretation and application of other statutes. For instance, the Fastener Quality Act of 1990 bases misdemeanor and felony crimes on negligence, just like § 1319(c)(1) of the Clean Water Act. The Fastener Quality Act governs "fasteners," which are screws, nuts, bolts, studs and washers. 15 U.S.C. § 5402(5)

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[6] The Ninth Circuit also cited the phrase "gross negligence" in 33 U.S.C. § 1321(b)(7)(D) to support its interpretation. 176 F.3d at 1121. The phrase "gross negligence," however, was not added to the statute until 1990, three years after § 1319(c)(1) was enacted. The Ninth Circuit therefore relied on a later act of Congress to discern what an earlier Congress meant. "A later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

(1994). The Act provides that one who "negligently fails to maintain records relating to a fastener" in violation of the Act is subject to fines and imprisonment of up to 2 years. 15 U.S.C. § 5408(c)(3) (1994).

If the Ninth Circuit's decision is allowed to stand, it will be persuasive authority for interpreting "negligently" in the Fastener Quality Act to mean ordinary civil negligence. The result will be that a person who is merely neglectful about the paperwork on nuts and bolts may be branded a felon and imprisoned for up to two years without any proof of mens rea. Such a harsh result would be shocking. Felony is "as bad a word as you can give to man or thing." *Morissette*, 342 U.S. at 250.

The extension of criminal liability to persons who are negligent only in a civil tort sense also raises fundamental policy questions about the overall direction of criminal law. "[B]lurring of the border between tort and crime predictably will result in injustice, and ultimately weaken the efficacy of the criminal law as an instrument of social control." John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. Rev. 193, 193 (1991). "We undermine the foundation of criminal law when we so vitiate the requirement of a criminal state of knowledge and intention as to make felons of the morally innocent." *Weitzenhoff*, 35 F.3d at 1299 (Kleinfeld, J., dissenting on denial of rehearing *en banc*).

To ensure the future direction of criminal law is appropriate, this Court should grant Hanousek's petition and address the meaning of the word "negligently" in a criminal statute such as § 1319(c)(1) of the Clean Water Act.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this petition be granted.

DATED this 20th day of August, 1999.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD HANOUSEK, JR., Defendant-Appellant.	No. 97-30185 DC No. CR-96-0040-JMF OPINION

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted
May 4, 1998-Seattle, Washington

Filed March 19, 1999

Before: David R. Thompson and A. Wallace Tashima,
Circuit Judges, and Tom Stagg, District Judge.*

Opinion by Judge Thompson

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*Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

SUMMARY

Criminal Law and Procedure/Environmental Law

The court of appeals affirmed a judgment of conviction. The court held that the Clean Water Act may impose criminal liability for ordinary negligence.

In October 1994, thousands of gallons of oil were discharged into the Skagway River when a backhoe operator struck a pipeline adjacent to a rail line operated by the White Pass and Yukon Railroad, causing a rupture. The backhoe operator was an employee of Hunz and Hunz, a contractor that had been hired by Pacific and Arctic Railway and Navigation Company to work on a rock-quarrying project along the rail line. Appellant Edward Hanousek, Jr. was Pacific and Arctic's roadmaster, and the supervisor of the quarrying project.

Hanousek was charged with negligently discharging a harmful quantity of oil into a navigable water of the United States in violation of §§ 1319(c)(1)(A) and 1321(b)(3) of the Clean Water Act (CWA). The indictment also charged Hanousek with conspiring to provide false information to Coast Guard officials who investigated the accident. Also charged with related offenses was M. Paul Taylor, a Pacific and Arctic officer.

The government's evidence showed that Hanousek was responsible for the rock-quarrying project; the project involved the use of heavy equipment and machinery along the worksite; Hanousek directed the daily activities of Hunz and Hunz employees and equipment; and that it was

customary to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline.

The government's evidence also established that when the work began, Hunz and Hunz had applied protective covering material to the pipeline, and that when Hanousek took over supervision of the project, no further sections of the pipeline were protected, including the site of the rupture.

Other government evidence indicated that although the quarrying work had been completed in the location of the rupture, rocks would fall off loaded railcars; that no policy prohibited the use of backhoes off the work platform for other activities; that a backhoe operator ruptured the pipeline while moving a rock with his machine; and that a harmful quantity of oil spilled into the Skagway.

The district court rejected Hanousek's proposed jury instruction that the government had to prove criminal negligence, as opposed to ordinary negligence, and rejected his proposed instruction that he could not be found vicariously liable for the negligence of the backhoe operator.

The jury convicted Hanousek on the substantive charge and acquitted him on the conspiracy count. At sentencing, the district court imposed an upward adjustment for Hanousek's supervisory role in the offense.

On appeal, Hanousek contended that the district court erred in rejecting his proposed jury instructions; the ordinary negligence standard for criminal liability violated due process; the prosecutor struck "foul blows" by inviting the jury to convict him on a theory of vicarious liability; the court's causation instruction failed sufficiently to inform the jury that to support a conviction, the accident must have been within the risk foreseeably created by Hanousek's conduct; and the evidence was insufficient to support his

conviction. Hanousek also challenged the district court's application of the Sentencing Guidelines.

[1] Sections 13 l9(c)(1)(A) and 1321(b)(3) of the CWA criminalize the conduct of which Hanousek was convicted. [2] Neither section defines the term "negligently," nor is it defined elsewhere in the CWA. The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. [3] If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly. [4] Congress intended that a person who acts with ordinary negligence in violating §1321(b)(3) may be subject to criminal penalties.

[5] The criminal provisions of the CWA constitute public welfare legislation designed to protect the public from potentially harmful or injurious items. Public welfare legislation may render criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. [6] A public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process.

[7] In the context of a public welfare statute, as long as a defendant knows he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation. Hanousek did not dispute that he was aware that a highpressure petroleum products pipeline ran close to the surface next to the railroad tracks, and did not argue that he was unaware of the dangers a puncture would pose. Hanousek therefore should have been alerted to the probability of strict regulation. [8] Section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.

[9] The district court's instructions adequately explained to the jury that Hanousek could be convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others. The district court's failure to provide Hanousek's proposed instructions on vicarious liability did not constitute reversible error. [10] The prosecutor was appropriately arguing to the jury that Hanousek and Taylor failed adequately to protect the pipeline and that both should be held responsible for their negligent conduct.

[11] To establish causation, the government must prove beyond a reasonable doubt that the defendant's conduct was both the cause in fact and the proximate cause of the harm. To prove proximate cause, the government must establish that the harm was a foreseeable result of the conduct. [12] The causation instruction given by the district court was adequate. It required the jury to find that Hanousek's conduct had a direct and substantial connection to the discharge of oil. That was sufficient.

[13] The totality of the evidence was sufficient to support Hanousek's conviction for negligently discharging a harmful quantity of oil into a navigable water of the United States.

[14] The district court may make an upward adjustment if the defendant supervised one or more participants. A participant is a person who is criminally responsible for the commission of the offense, but need not have been convicted. The district court did not clearly err by finding that Hanousek was a supervisor because, although the backhoe operator was not prosecuted, he was a participant in the criminal activity, and Hanousek supervised the project.

COUNSEL

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Ellen J. Durkee, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

Edward Hanousek, Jr., appeals his conviction and sentence for negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3).

Hanousek contends that the district court erred: (1) by failing to instruct the jury that the government must prove that he acted with criminal negligence as opposed to ordinary negligence, (2) by failing to instruct the jury that he could not be found vicariously liable, (3) by failing to instruct the jury properly on causation, and (4) by incorrectly applying the United States Sentencing Guidelines.

Hanousek also argues that section 1319(c)(1)(A) violates due process if it permits a criminal conviction for ordinary negligence and that, in any event, the evidence was insufficient to support his conviction. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

FACTS

Hanousek was employed by the Pacific & Arctic Railway and Navigation Company (Pacific & Arctic) as roadmaster of the White Pass & Yukon Railroad, which

runs between Skagway, Alaska, and Whitehorse, Yukon Territory, Canada. As roadmaster, Hanousek was responsible under his contract "for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad . . . and [was to] assume similar duties with special projects."

One of the special projects under Hanousek's supervision was a rock-quarrying project at a site alongside the railroad referred to as "6-mile," located on an embankment 200 feet above the Skagway River. The project was designed to realign a sharp curve in the railroad and to obtain armor rock for a ship dock in Skagway. The project involved blasting rock outcroppings alongside the railroad, working the fractured rock toward railroad cars, and loading the rock onto railroad cars with a backhoe. Pacific & Arctic hired Hunz & Hunz, a contracting company, to provide the equipment and labor for the project.

At 6-mile, a high-pressure petroleum products pipeline owned by Pacific & Arctic's sister company, Pacific & Arctic Pipeline, Inc., runs parallel to the railroad at or above ground level, within a few feet of the tracks. To protect the pipeline during the project, a work platform of sand and gravel was constructed on which the backhoe operated to load rocks over the pipeline and into railroad cars. The location of the work platform changed as the location of the work progressed along the railroad tracks. In addition, when work initially began in April, 1994, Hunz & Hunz covered an approximately 300-foot section of the pipeline with railroad ties, sand, and ballast material to protect the pipeline, as was customary. After Hanousek took over responsibility for the project in May, 1994, no further sections of the pipeline along the 1000-foot work site were protected, with the exception of the movable backhoe work platform.

On the evening of October 1, 1994, Shane Thoe, a Hunz & Hunz backhoe operator, used the backhoe on the work platform to load a train with rocks. After the train departed, Thoe noticed that some fallen rocks had caught the plow of the train as it departed and were located just off the tracks in the vicinity of the unprotected pipeline. At this location, the site had been graded to finish grade and the pipeline was covered with a few inches of soil. Thoe moved the backhoe off the work platform and drove it down alongside the tracks between 50 to 100 yards from the work platform. While using the backhoe bucket to sweep the rocks from the tracks, Thoe struck the pipeline causing a rupture. The pipeline was carrying heating oil, and an estimated 1,000 to 5,000 gallons of oil were discharged over the course of many days into the adjacent Skagway River, a navigable water of the United States.

Following an investigation, Hanousek was charged with one count of negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3). Hanousek was also charged with one count of conspiring to provide false information to United States Coast Guard officials who investigated the accident, in violation of 18 U.S.C. §§ 371, 1001.[1]

[1] The government also charged M. Paul Taylor, an officer of Arctic & Pacific and Arctic & Pacific Pipeline, Inc., with one count of negligently discharging a harmful quantity of oil into a navigable water in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3), one count of failing to report a discharge in violation of 33 U.S.C. §1321(b)(5), one count of conspiracy to make false statements in violation of 18 U.S.C. §§ 371, 1001, five counts of making false statements in violation of 18 U.S.C. §1001, and one count of obstructing justice. In the joint trial with Hanousek, the jury acquitted Taylor of all charges except two counts of making false statements in violation of 18 U.S.C. §1001.

After a twenty-day trial, the jury convicted Hanousek of negligently discharging a harmful quantity of oil into a navigable water of the United States, but acquitted him on the charge of conspiring to provide false information. The district court imposed a sentence of six months of imprisonment, six months in a halfway house and six months of supervised release, as well as a fine of $5,000. This appeal followed.

DISCUSSION

A. Negligence Jury Instruction

Hanousek contends the district court erred by failing to instruct the jury that, to establish a violation under 33 U.S.C. § 1319(c)(1)(A), the government had to prove that Hanousek acted with criminal negligence, as opposed to ordinary negligence, in discharging a harmful quantity of oil into the Skagway River. In his proposed jury instruction, Hanousek defined criminal negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation." See American Law Institute, Model Penal Code § 2.02(2)(d) (1985). Over Hanousek's objection, the district court instructed the jury that the government was required to prove only that Hanousek acted negligently, which the district court deemed as "the failure to use reasonable care."

Whether the jury instruction provided by the district court misstated an element of 33 U.S.C. § 1319(c)(1)(A) presents a question of statutory interpretation, which we review de novo. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993).

Statutory interpretation begins with the plain language of the statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the language of the statute is clear, we need look no further than that language

in determining the statute's meaning. *See United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995). "Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *Id.* at 228-29. "When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or subsections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1067 (9th Cir. 1995).

[1] Codified sections 1319(c)(1)(A) & 1321(b)(3) of the Clean Water Act work in tandem to criminalize the conduct of which Hanousek was convicted. Section 1319(c)(1)(A) provides that any person who negligently violates 33 U.S.C. § 1321(b)(3) shall be punished by fine or imprisonment, or both.[2] Section 1321(b)(3) proscribes the actual discharge of oil in harmful quantities into navigable waters of the United States, adjoining shore lines or waters of a contiguous zone, as well as other specified activity.

[2] Neither section defines the term "negligently," nor is that term defined elsewhere in the CWA. In this circumstance, we "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. 16, 21 (1983) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. *See Black's Law*

[2] 33 U.S.C. §1319(c)(1)(A) provides that first-time negligent violators shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. The same statute provides that second-time negligent violators shall be punished by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

Dictionary 1032 (6th ed. 1990); *The Random House College Dictionary* 891 (Rev. ed. 1980).

[3] If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did in 33 U.S.C. § 1321(b)(7)(D). This section of the CWA provides for increased civil penalties "[i]n any case in which a violation of [33 U.S.C. § 1321(b)(3)] was the result of gross negligence or willful misconduct." 33 U.S.C. § 1321(b)(7)(D). This is significant. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (quoting *United States v. Wong Kim Bo*, 472 U.S. 720, 722 (5th Cir. 1972)).

Hanousek argues that Congress could not have intended to distinguish "negligently" in 33 U.S.C. § 1319(c)(1)(A) from "gross negligence" in 33 U.S.C. § 1321(b)(7)(D) because the phrase "gross negligence" was only recently added to the statute in 1990. *See* Oil Pollution Control Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). We reject this argument because Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted. *See United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 944 (1997).

[4] We conclude from the plain language of 33 U.S.C. § 1319(c)(1)(A) that Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties.[3] We next consider Hanousek's argument that, by imposing an

[3] In light of our conclusion that 33 U.S.C. §1319(c)(1)(A) unambiguously permits criminal penalties for ordinary negligence, the rule of lenity has no application. *See Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994).

ordinary negligence standard for a criminal violation, section 1319(c)(1)(A) violates the due process clause of the Constitution.

B. Due Process

We review de novo whether a statute violates a defendant's right to due process. *See United States v. Savinovich*, 845 F.2d 834, 838-39 (9th Cir. 1988).

[5] The criminal provisions of the CWA constitute public welfare legislation. *See Weitzenhoff*, 35 F.3d at 1286 ("The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, *see* S. Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985), and as such fall within the category of public welfare legislation."). Public welfare legislation is designed to protect the public from potentially harmful or injurious items, *see Staples v. United States*, 511 U.S. 600, 607 (1994), and may render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety," *see Liparota v. United States*, 471 U.S. 419, 433 (1985).

[6] It is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process. *See United States v. Balint*, 258 U.S. 250, 252-53 (1922) ("[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells."); *see also Morissette v. United States*, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who

assumed his responsibilities."); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *Staples*, 511 U.S. at 607 n.3 (reiterating that public welfare statutes may dispense with a "mental element").

Recognizing that our holding in *Weitzenhoff* would defeat his due process argument, Hanousek attempts to distinguish *Weitzenhoff*. The attempt fails. In *Weitzenhoff*, two managers of a sewage treatment plant operating under a National Pollution Discharge Elimination System permit were convicted of knowingly discharging pollutants into a navigable water of the United States, in violation of 33 U.S.C. §§ 1311(a) & 1319(c)(2). *See Weitzenhoff*, 35 F.3d at 1282-83. In rejecting the defendants' contention that the district court erred by failing to instruct the jury that the government had to prove that the defendants knew their acts violated the permit or the CWA, we held that the criminal provisions of the CWA constitute public welfare legislation and that the government was not required to prove that the defendants knew their conduct violated the law. *See id.* at 1286. We explained that, "[w]here. . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *See id.* at 1284 (quoting *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

[7] Hanousek argues that, unlike the defendants in Weitzenhoff who were permittees under the CWA, he was simply the roadmaster of the White Pass & Yukon railroad charged with overseeing a rock-quarrying project and was not in a position to know what the law required under the CWA. This is a distinction without a difference. In the

context of a public welfare statute, "as long as a defendant knows he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' he should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quoting *Dotterweich*, 320 U.S. at 281). Although Hanousek was not a permittee under the CWA, he does not dispute that he was aware that a high-pressure petroleum products pipeline owned by Pacific & Arctic's sister company ran close to the surface next to the railroad tracks at 6-mile, and does not argue that he was unaware of the dangers a break or puncture of the pipeline by a piece of heavy machinery would pose. Therefore, Hanousek should have been alerted to the probability of strict regulation. *See id.*[4]

[8] In light of our holding in *Weitzenhoff* that the criminal provisions of the CWA constitute public welfare legislation, and the fact that a public welfare statute may impose criminal penalties for ordinary negligent conduct without offending due process, we conclude that section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.

C. Vicarious Liability Jury Instruction

Hanousek next contends that the district court erred by failing to instruct the jury that he could not be found vicariously liable for the negligence of Shane Thoe, the Hunz & Hunz backhoe operator.

We review de novo whether a district court's instructions adequately cover a defense theory. *See United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). We will

[4] Although Hanousek argues that "the harsh penalties that may be imposed for violations of § 1319(c)(1) are another indication that the law of 'public welfare' offenses should not be applicable," this argument was rejected in *Weitzenhoff*. *See Weitzenhoff*, 35 F.3d at 1286 n.7.

affirm a district court's refusal to give an otherwise proper theory-of-defense instruction if the instructions actually given, in their entirety, adequately cover the defense theory. *See id.*

The first of Hanousek's proposed instructions dealing with vicarious liability reads as follows:

> You are instructed that Defendant Edward Hanousek is not responsible for and cannot be held criminally liable for any negligent acts or omissions by Shane Thoe or other Hunz & Hunz personnel.

Hanousek also requested a more general instruction that "a person is responsible under the criminal law only for acts he performs or causes to be performed on behalf of a corporation."

The district court rejected Hanousek's proposed instructions without explanation. However, the district court did instruct the jury as follows:

> In order for the defendant Ed Hanousek to be found guilty of negligent discharge of oil, the government must prove the following elements beyond a reasonable doubt:
>
> 1. The particular defendant caused the discharge of oil;
>
> 2. The discharge of oil was into a navigable waterway of the United States;
>
> 3. The amount of oil was of a quantity that may be harmful; and
>
> 4. The discharge was caused by the negligence of the particular defendant.

[9] We conclude that the district court's instructions adequately explained to the jury that Hanousek could be

convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others working at 6-mile. *See United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991) (stating that we consider the jury instructions as a whole and consider how they will be reasonably understood by the jury). Accordingly, the district court's failure to provide Hanousek's proposed instructions on vicarious liability does not constitute reversible error.

[10] In a related argument, Hanousek argues that the district court erred by allowing the government to strike "foul blows" during closing argument by inviting the jury to convict Hanousek on a theory of vicarious liability. We disagree. In the course of closing argument, the prosecutor stated, "[w]hen Shane Thoe hit that unprotected pipeline and that oil fired out of that pipeline, sprayed up into the air, and got into that Skagway River, these two defendants are guilty of negligent discharging [oil] into the Skagway River." The prosecutor also told the jury that "the buck stops" with Hanousek and M. Paul Taylor, an officer of both Arctic & Pacific and Arctic & Pacific Pipeline, Inc. When read in context, the prosecutor was appropriately arguing to the jury that Hanousek and Taylor failed to adequately protect the pipeline and that both should be held responsible for their negligent conduct. *See United States v. Prantil*, 764 F.2d 548, 555 (9th Cir. 1985) (stating that the district court must allow the prosecution the freedom to strike "hard blows" based on the evidence and all fair inferences drawn therefrom).

D. Causation Jury Instruction

[11] To establish the element of causation, the government must prove beyond a reasonable doubt that the defendant's conduct was both the cause in fact and the proximate cause of the harm. *See United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986). To prove proximate

cause, the government must establish that the harm was a foreseeable result of the conduct. *See United States v. Main*, 113 F.3d 1046, 1049 (9th Cir. 1997). In the context of an involuntary manslaughter prosecution, we recently stated:

> All of the authorities agree that to be guilty of involuntary manslaughter the harmful result must be within the risk foreseeably created by the accused's conduct; if the physical causation is too remote, the law will not take cognizance of it. *"The same result has been achieved by requiring that the accused's conduct be a substantial factor in causing the harmful result or that it be the proximate, primary, direct, efficient, or legal cause of such harmful result."*

Id. (quoting Charles E. Torcia, *Wharton's Criminal Law* § 26 at 148-151 (1993) (emphasis added)).

Hanousek contends that the district court's causation instruction failed to sufficiently inform the jury that, to find Hanousek guilty under 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3), the accident must have been within the risk foreseeably created by Hanousek's conduct.

The district court gave the jury the following instruction on causation:

> In order to prove that a particular defendant caused the negligent discharge of oil as alleged in Count 1 of the indictment, the government must prove beyond a reasonable doubt that:
>
> 1. The particular defendant's conduct had a direct and substantial connection to the discharge; and
>
> 2. The discharge would not have occurred but for the particular defendant's conduct.

Hanousek did not object to this instruction, but asked that the following instruction, taken directly from *Model Penal Code* § 2.03(3), also be given:

> The element of causation is not established if the actual result is not within the risk of which the particular defendant was aware or should have been aware, unless:
>
> (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense.

[12] The district court properly declined to provide the jury with the additional instruction Hanousek requested. The causation instruction given by the district court was adequate under *Main*. It required the jury to find that Hanousek's conduct had a "direct and substantial connection" to the discharge of oil. That was sufficient. *See United States v. Warren*, 25 F.3d 890, 895-96 (9th Cir. 1994) ("A court may reject portions of a proposed theory of defense that merely rephrase explanations of the law adequately covered elsewhere in the instructions.").

E. Sufficiency of the Evidence

Although Hanousek did not list sufficiency of the evidence as one of the issues in his briefs, he nevertheless included in his opening and reply briefs an extensive discussion of the evidence and argued that the evidence was

insufficient to support his conviction. The government responded to this argument in its brief, and both sides at oral argument argued the issue of whether the evidence was sufficient to support Hanousek's conviction. Because the issue has been presented in this way by the parties, and fully argued, we consider it.

We review the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994).

The government presented evidence at trial that Hanousek was responsible for the rock-quarrying project at 6-mile; that the project involved the use of heavy equipment and machinery along the 1000-foot work site; that Hanousek directed the daily activities of Hunz & Hunz employees and equipment; and that it was customary to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline. The government also presented evidence that when work initially began in April, 1994, Hunz & Hunz covered an approximately 300-foot section of the pipeline with railroad ties, sand, and ballast material to protect the pipeline; that after Hanousek took over responsibility for the project in May, 1994, no further sections of the pipeline along the work site were protected; and that the section of the pipeline where the rupture occurred was not protected with railroad ties, sand or ballast. Finally, the government presented evidence that although the rock quarrying work had been completed in the location of the rupture, rocks would sometimes fall off the loaded railroad cars as they proceeded through the completed sections of the work site; that no policy prohibited the use of backhoes off the work platform for other activities; that a backhoe operator ruptured the unprotected pipeline while using a backhoe to remove a rock

from the railroad tracks; and that a harmful quantity of oil was discharged into the Skyway River.

[13] The totality of this evidence is sufficient to support Hanousek's conviction for negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3).

F. Sentencing

Based on an offense level of 12 and a criminal history category of I, the district court sentenced Hanousek to 6 months in prison, 6 months in a halfway house, and 6 months of supervised release.

1. Upward Adjustment for Supervisory Role

Hanousek contends that the district court erred by making a two-point upward adjustment under United States Sentencing Guidelines § 3B1.1(c) based on his role as a supervisor in a criminal activity. We disagree.

[14] Pursuant to U.S.S.G. § 3B1.1, the district court may make an upward adjustment if the defendant supervised one or more participants. *See United States v. Cyphers*, 130 F.3d 1361, 1363 (9th Cir. 1997). A participant is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." *Id.* (quoting U.S.S.G. § 3B1.1 Application Note 1). Here, the district court did not clearly err by finding that Hanousek was a supervisor because, although the backhoe operator was not prosecuted, he was nonetheless a participant in the criminal activity, and Hanousek supervised the project at 6-mile.

2. Sentencing Form

Hanousek correctly notes that the sentencing form attached to the final judgment contains "mathematical errors" because it erroneously indicates that the imprisonment range for an offense level of 12 is up to 6

months (the actual range is 10 to 16 months, *see* U.S.S.G. Ch. 5 Pt. A) and that the supervised release range is up to 6 years (the maximum term of supervised release for a misdemeanor (other than a petty offense) is 1 year, *see* 18 U.S.C. § 3583(b)(3)). However, these errors were clerical and did not play a role in Hanousek's sentencing. At the sentencing hearing, the district court correctly stated that the guideline for an offense level of 12 was 10 to 16 months, and the district court imposed only 6 months of supervised release, well under the one-year maximum.

3. U.S.S.G. § 5C1.1(d)

United States Sentencing Guideline § 5C1.1(d) provides:

> If the applicable guideline range is Zone C of the Sentencing Table, the minimum term may be satisfied by-
>
> (1) a sentence of imprisonment; or
>
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Hanousek contends that, in imposing sentence, the district court relied on incorrect information from the probation officer that, under U.S.S.G. § 5C1.1(d), the entire minimum sentence had to be served as a term of imprisonment. We disagree. The probation officer did originally advise the district court incorrectly that the entire minimum sentence had to be served as a term of imprisonment. However, after the district court questioned the probation officer's reading of the guideline, the probation officer corrected herself by saying, "One-half of

the minimum term could be served in imprisonment. I'm sorry." The district court did not rely on incorrect information.

4. Departures

We lack jurisdictior to review the district court's refusal to depart downward from the Sentencing Guidelines. *See United States v. Webster*, 108 F.3d 1156, 1158 (9th Cir. 1997). The district court recognized that it had the discretion to make the departures requested by Hanousek, but chose not to do so. *See id.*

CONCLUSION

In light of the plain language of 33 U.S.C. § 1319(c)(1)(A), we conclude Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subjected to criminal penalties. These sections, as so construed, do not violate due process. Accordingly, the district court properly instructed the jury on ordinary negligence. We also conclude that the district court properly instructed the jury on causation and did not err by refusing to provide the jury with Hanousek's proposed jury instructions on vicarious liability. Finally, the evidence was sufficient to support Hanousek's conviction, and the district court properly imposed its sentence under the Sentencing Guidelines.

AFFIRMED.[5]

[5] Judge Stagg intends to file a separate dissenting opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. A96-0040 CR (JMF)
vs.	)	
M. PAUL TAYLOR, JR. and EDWARD HANOUSEK, JR.,	)	Anchorage, Alaska Wednesday, December 11, 1996 9:02 o'clock a.m.
Defendants.	)	TRIAL BY JURY - 16TH DAY

VOLUME XVI

PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES M. FITZGERALD
UNITED STATES DISTRICT JUDGE

THE COURT: I'm going – I came in prepared to rule on the – both Mr. Paul Davis' [sic] motion for judgment of acquittal and the motion of Edward Hanousek for judgment of appeal, and I'd also reviewed and undertake to –

undertaken to make a – come up with an interpretation of the term "negligently violates" as it's contained in Title 33 U.S. Code Section 1391, subpart (c)(1).

I'm going to rule on that because it does play a part in the decision relating to the Defendant Hanousek. On the issue of Taylor's motion for judgment of acquittal, I'm going to take a better look at the authorities than I have at this time, and I'll rule on it probably later in the day.

Here are my rulings that I am prepared to make. I've undertaken a review of whether the term "negligently violate" as used in Title 33 U.S. Code Section 1391(c)(1) refers to criminal negligence or simple negligence. The pertinent language of Section 1319 [sic], subpart (c)(1) is entitled Criminal Penalties and addresses negligent violations. The pertinent language provides that any person who negligently violates certain sections of the Clean Water Act shall be punished by a fine of up to $25,000 per day and imprisonment of up to one year.

The starting point for interpreting a statute and the language that – is the language of the statute itself. See Consumer ,Product Safety Commission versus GTE Sylvania, Incorporated, 447 U.S. 102 at 108, 1980. Here the plain language of the statute is:

> "Negligently violates; there is no reference to criminal negligence, or willful negligence. The reference to negligently violates is unambiguous, and where the language of the statute is unambiguous, the plain meaning controls. U.S. versus Curtis, 988 F.2d 946, Ninth Circuit 1993."

From the language of the statute (indiscernible) court, I conclude that Congress intended to impose liability for simple negligence. A review of the legislative history supports that conclusion. Congress' intent in passing the

Water Pollution Control Act was to eliminate discharges of pollution. Elimination of discharges of pollution could be more readily achieved through a simple negligence rather than a criminal negligence standard.

In the House debates, Congressman Vanek (ph) offered an amendment to provide for criminal penalties for anyone who negligently violated an administrative order. Congressman Hosha (ph) opposed the amendment, argued that, quote:

> "In this legislation, we already can charge a man for simple negligence. We can charge him with criminal violation under this bill for simple negligence," end of quote.

Congressman Vanek's amendment was rejected. See Committee Print: a Legislative History of the Water Pollution Control Act Amendments of 1972, Volume I, at pages 528 to 530. My review of the legislative history finds repeated references to punishing negligent violations of the Water Patrol – Pollution Control Act without mentioning criminal negligence. Nothing in the legislative history suggests that the Court should divert from the plain meaning of the statute. See Conference Report on the 1987 Water Pollution Control Act Amendments as Reported in the Clean Water Desk Book at 14 – 147, 1991.

I find that the term "negligently violates" as used in the statute means negligence, but not criminal negligence. Then –

(Pause)

THE COURT: I have reviewed Bacchian versus New Hampshire, 414 U.S. 478, Supreme Court 1974. That case had to do with a sale of a button said to be obscene, where a juvenile 14-year-old girl – the operator of the shop where the sale was made was charged with willfully

contributing to the delinquency of a minor, in violation of the state statute. The state supreme court held that under the statute, the state was required to prove that the willful – that the – that a willful component was included in the statute and required the state to prove that the operator acted voluntarily, unintentionally, and not because of mistake or accident.

United States Supreme Court reviewed the evidence and found that under the evidence the government had failed – state had failed to prove that the store operator personally sold the button to the girl, knowing her to be a minor, or that he personally caused another to sell her the button, although the operator conceded that he controlled the premises on the date the sale was made. This concession, however, failed to establish the willfulness requirement of the state statute. Certainly under the New Hampshire statute, the state failed to prove an essential element.

The reason I've undertaken to interpret the federal statute in the present case is to determine whether more than simple negligence is required. While Bacchian may be instructive, since it held that an operator or manager could not be held liable on a theory of strict liability under the New Hampshire statute. However, I'm not prepared to say Bacchian is controlling in the present case. I've interpreted the statute – federal statute to require the government prove the defendant negligent. Subsequent cases citing to Bacchian hold that a case stands for the rule that every essential element of a crime must be supported by relevant evidence. Bacchian as I read it does not hold that a manager or operator may not be held strictly liable under that statute.

So I'm going to take a look at the strict liability issue in light of those cases. I have, however, reviewed the evidence, and leaving aside the strict liability issue, I'm going to rule on whether or not simple negligence or negligence

has been established under the evidence insofar as both the Defendant Taylor and the Defendant Edward Hanousek. That is, whether leaving completely out of the decision the responsibility that may be imposed on a corporate officer under the doctrine of strict liability, I find that even construing the evidence on negligence, leaving apart strict liability, favorable to the government as I must at this time, there's not evidence upon which a reasonable juror might find Taylor negligent.

I'm not prepared at this time in view of the evidence that Edward Hanousek was in charge of day-to-day operations during the period in which the oil spill occurred at 6 Mile, that he may not be held contributory negligent in causing the oil spill. At this time I deny his motion for judgment of acquittal. However, if he should be found guilty of Count I, then this issue will be again considered.

APPENDIX C

FILED
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Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWARD HANOUSEK, Defendant-Appellant.	No. 97-30185 DC # CR-96-00040-JMF ORDER

Before: THOMPSON and TASHIMA, Circuit Judges, and STAGG, District Judge.[1]

A majority of the judges on this panel have voted to deny the petition for rehearing. Judge Tashima has voted to deny the petition for rehearing en banc, and Judge Thompson recommended denial of the petition.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has

---

[1] The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

APPENDIX D

TITLE 33, UNITED STATES CODE

§ 1319. Enforcement

. . . .

(c) Criminal penalties

(1) Negligent violations

Any person who–

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a

person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

. . . .

§ 1321. Oil and hazardous substance liability

(a) Definitions

For purpose of this section, the term –

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

. . . .

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions; penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs; alternative remedies and withholding clearance of vessels

. . . .

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management

Act [16 U.S.C. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

. . . .

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive

materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

APPENDIX E

CODE OF FEDERAL REGULATIONS

TITLE 40

§ 110.1 Definitions.

. . .

Sheen means an iridescent appearance on the surface of water.

§ 110.3 Discharge of oil in such quantities as "may be harmful" pursuant to section 311(b)(4) of the Act.

For purposes of section 311(b)(4) of the Act, dishcarges of oil in such quantities that the Administrator has determined may be harmful to the public health or welfare or the environment of the United States include discharges of oil that:

(a) Violate applicable water quality standards; or

(b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

Supreme Court, U.S.
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(2)

No. 99-323

In the
Supreme Court of the United States

EDWARD HANOUSEK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Pacific Legal Foundation

2418

QUESTIONS PRESENTED

1. Is the Clean Water Act a "public welfare" statute (as the Ninth, Eighth, and Second Circuits have ruled, but contrary to the rulings of the Fifth Circuit and arguably the Fourth Circuit) so as to justify criminal conviction and imprisonment, without proof of *mens rea*, for otherwise innocent conduct?

2. Does the Due Process Clause restrict eliminating *mens rea* for offenses punishable by significant terms of imprisonment of one year or more?

3. Does the unmodified word "negligently" in section 1319(c)(1)(A) of the Clean Water Act, a criminal statute that provides for both misdemeanor and felony penalties, mean negligence in an ordinary civil tort sense or negligence in an aggravated criminal sense?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and the courts to expand the enforcement power of the government, merely for prosecutorial convenience, by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of due process. This case is a singular example of government overreaching.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The Ninth Circuit has held wholly unintentional conduct may subject ordinary citizens to substantial fines and even imprisonment. Under this dangerous precedent, ordinary negligence—or a simple mistake—is as much a crime as an intentional and malicious violation of the law. This insidious attack on the liberty of ordinary people is contrary to common sense and Supreme Court precedent. Strict liability offenses undermine the freedoms of all citizens and should be narrowly construed.

PLF has a long history of amicus curiae participation in this Court and believes its public policy perspective will provide a necessary viewpoint on the issues presented in this case.

INTRODUCTION

This case presents an extreme application of the "public welfare offense" doctrine. Under Ninth Circuit jurisprudence, apparently innocent conduct becomes criminal—a backhoe operator inadvertently cracks an oil pipeline causing a spill in a nearby river, and the backhoe operator's supervisor is convicted of a crime and sentenced to six months in jail, six months in a half-way house, six months probation, and fined $5,000. This is contrary to Supreme Court precedent and an assault on common sense. Only in very limited circumstances has this Court inferred from congressional silence that Congress did not intend to require proof of criminal intent to establish a criminal offense. However, some lower courts are regularly making just such an inference.

To be sure, strict criminal liability eases the prosecution's path to conviction but only at the expense of fundamental concepts of fairness and constitutional principles of due process. This case, and others like it, turn our traditional values upside down. Consider the case of *Unser v. United States*, United States Supreme Court No. 98-1600, also on petition to this Court. In that case, Bobby Unser was charged and convicted of a crime for operating a snowmobile in an unmarked wilderness

area where he accidentally wandered while disoriented in a sudden snowstorm. Unser nearly lost his life in the incident but that did not stop overzealous law enforcement officers from citing him for his inadvertent infraction of the law. Nor did it stop the Tenth Circuit from upholding Unser's criminal conviction as a "public welfare offense"—an offense requiring no *mens rea*.

American jurisprudence is founded on the bedrock principle that it is better to let the guilty go free than unfairly punish the innocent. The idea that one can be held criminally liable, even imprisoned, for inadvertent conduct serves no meaningful law enforcement purpose. It neither reforms conduct nor deters wrongdoing.

Strict criminal liability for ordinary acts is reminiscent of those immature systems of law whereby a tribunal is convened only to establish guilt for enemies of the state and not to determine innocence. This type of process is incompatible with a free society and should not be countenanced by this Court or any other. For this reason, this Court should grant the Petition for Writ of Certiorari in this case, as well as in *Unser v. United States*, and place meaningful limits on the expanding scope of the "public welfare offense" doctrine. Virtually all of our laws serve to protect public health and welfare. All of us are capable of apparently innocent acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would criminalize a broad range of innocent conduct.

STATEMENT OF THE CASE

Edward Hanousek was employed as road master of the White Pass & Yukon Railroad. As road master, Hanousek was responsible to oversee track maintenance and special projects for the railroad. One of the special projects under Hanousek's supervision was the quarrying of rock at a site near the Skagway River in Alaska. The project involved blasting rock out-

croppings and loading the rock onto railroad cars with a backhoe. An oil pipeline runs next to the track at or above ground. To protect tl ipeline, a platform was constructed over the pipeline on which the backhoe operated while loading rock. After one loading operation, a backhoe operator noticed rock debris just off the tracks near the pipeline about 150 to 300 feet from the work platform. The backhoe operator drove the backhoe to the debris and, while attempting to "sweep" the rocks away from the tracks, he ruptured the pipeline causing oil to be discharged into the Skagway River in violation of the Clean Water Act.

As Hanousek was responsible for all aspects of the operation, he was charged with a criminal count of negligently discharging a "harmful quantity" of oil into a "navigable water" of the United States. Section 1319(c)(1)(A) of the Clean Water Act provides that any person who "negligently" violates section 1321(b)(3) shall be punishable by fine or imprisonment or both. Section 1321(b)(3), in turn, prohibits the discharge of a "harmful quanitity" of oil into "navigable waters of the United States." Although the term "negligently" is undefined and this provision carries both misdemeanor and felony penalties, at trial the judge told the jurors Hanousek could be held criminally liable for acts of "ordinary" negligence. Hanousek was convicted of the violation and was sentenced to six months in prison, six months in a half-way house, six months of supervised release, and was fined $5,000.

Hanousek appealed his conviction on grounds the Clean Water Act did not allow for criminal liability for acts of "ordinary" as opposed to "gross" negligence. He also argued that to hold him criminally liable for an unintentional act, void of criminal intent, would violate his due process rights. However, the Ninth Circuit Court of Appeals held that Congress intended "ordinary" negligent acts to be subject to criminal penalties. And, purportedly relying on the precedents of this Court, the Ninth Circuit also held that the Clean Water Act

constitutes "public welfare legislation." Under such legislation, the court reasoned, criminal intent or *mens rea*, is not required for criminal prosecution.

SUMMARY OF THE ARGUMENT

The Ninth Circuit has taken the "public welfare offense" doctrine to a ridiculous extreme, finding that wholly inadvertent conduct is a crime warranting a substantial prison sentence. This ruling is important because it draws into question fundamental principles of criminal law. With the complicity of the courts, legislators and prosecutorial agencies are seeking quick convictions based on strict liability offenses. This is most evident in the increasing enforcement trends under federal environmental statutes which are readily characterized as "public welfare" statutes. But when such offenses encompass innocuous acts or wholly inadvertent conduct, they fail to deter crime and defy common sense. Such strict regulation violates the long-held doctrine that an injury can amount to a crime only when inflicted by guilty intention.

This Court has tried to limit "public welfare offenses" rather than expand them as the Ninth Circuit has done in this case. In *Morissette v. United States*, 342 U.S. 246 (1952), this Court affirmed that proof of a guilty mind is requisite to a criminal conviction and warned that a literal interpretation of its so-called "public welfare offense" cases is inconsistent with this Court's philosophy of criminal justice and any ordinary sense of fairness.

More recently, in *Staples v. United States*, 511 U.S. 600 (1994), this Court expressed grave concern over the imposition of prison terms for crimes that do not require a criminal intent. In fact, this Court stated it would not be inclined to find a "public welfare offense" where the penalties include substantial jail terms and declared the very concept of "public welfare offense" may simply be incompatible with a felony. After all, according to this Court, "felony" is as bad a word as you can

give to a man. But the provision under which Hanousek was convicted provides both misdemeanor and felony penalties for the same negligent conduct. Therefore, this Court should grant review and overturn the decision below.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER THE CLEAN WATER ACT IS "PUBLIC WELFARE LEGISLATION" AUTHORIZING CRIMINAL PENALTIES, INCLUDING SUBSTANTIAL TERMS OF IMPRISONMENT, FOR APPARENTLY INNOCENT CONDUCT

A. Overzealous Application of the "Public Welfare Offense" Doctrine Raises Questions Both Fundamental and Far-Reaching in Federal Criminal Law That Warrant a Response by This Court

The importance of this case cannot be overstated. In addition to the split among the circuits, addressed by Petitioner, this case involves legal issues requiring examination of some of the most fundamental concepts in criminal law and has significance far beyond the parties. *See United States v. Unser*, 165 F.3d 755, 757 (1999).

Indeed, this case is significant because the lower court decision authorizes criminal prosecution for wholly inadvertent conduct. In fact, this case turns fundamental concepts of criminal law on their head. It does away with considerations of intent and infers strict criminal liability from congressional silence. The lower court's lavish extension of the so-called "public welfare offense" exceeds the bounds of reason, good government, and the established precedents of this Court.

Regrettably, overzealous application of the "public welfare offense" seems to be a growing trend. More and more prose-

cutorial agencies rely on the ease of strict liability statutes to get a quick conviction. Nowhere is this more evident than in the enforcement of our federal environmental laws.

In a recent law review article, Kevin Gaynor and Thomas Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colorado Journal of International Environmental Law & Policy 39, Winter, 1999, catalogue the increase in environmental law enforcement over the last 10 or more years. They discuss with some concern the tendency for courts and prosecutors to raise the penalty while lowering the bar on convictions. "Thus, the sanctions for environmental crimes increasingly include significant terms of imprisonment." *Id.* at 40. But,

> [u]nder current case law in most circuits, the standard of intent the government must show for a conviction is less than a general intent standard and does not necessarily require proof that the defendant had knowledge of all the material facts.

Id. at 39.

Statistically, the authors report:

> EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison.

Id. at 40.

These figures would be something to cheer about if they included only serious offenses occasioned by willful conduct. But to the extent they include minor violations occasioned by innocent conduct, these figures are cause for concern. While

cases such as *Hanousek* and *Unser* give us a warm feeling because they add arithmetically to the appearance of vigorous enforcement of the law, they actually document the eroding rights of the individual—rights the courts should be protecting but are not.

According to Gaynor and Bartman, the latest amendments to each major environmental statute included new criminal penalties and strengthened existing penalties. Some of these amendments expanded the scope of criminal liability by introducing lower or no intent crimes, such as mere "negligent" conduct under the Clean Air Act, *id.* at 40, or, as in this case, the Clean Water Act, 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Moreover,

> [t]he federal sentencing guidelines governs [*sic*] the sentencing of individuals convicted of environmental offenses and has limited the discretion of judges to mitigate statutory penalties, even in cases that do not involve environmental injury.

Gaynor and Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Envtl. L. & Poly at 41.

Gaynor and Bartman conclude:

> The view of environmental laws as "public welfare" statutes and the corresponding trend toward liberal construction and precedent involving nonenvironmental public welfare statutes have complicated the issue of culpability.

Id. at 59.

This complicated issue of culpability requires clarification by this Court. Clearly, strict criminal liability offenses are

proliferating. As they expand to encompass inadvertent acts such as those at issue in this case, they put ordinary citizens at risk of criminal conviction for apparently innocent conduct. The imposition of criminal penalties in the absence of a criminal intent violates the central theme of criminal law that "wrongdoing must be conscious to be criminal" and is incompatible with a free society. *See Morissette,* 342 U.S at 252.

The observation and admonition of Gaynor and Bartman warrants the attention of this Court:

> EPA Administrator Carol Browner has advocated recent environmental criminal legislation on grounds that environmental criminals should be treated forcefully, like drug dealers. No acknowledgment is made in this connection that drug dealers usually receive a higher intent standard than has been the case in the area of environmental crimes. One of the supporters of the Environmental Crimes and Enforcement Act of 1996, Senator Frank Lautenberg, noted that it was "aimed at bad actors who violate our environmental laws purposely, intentionally, or with knowing disregard for the impact of their actions." Environmental Crimes and Enforcement Act of 1996, S. 2096, 104th Cong. (1996). These are clearly the proper targets of criminal prosecution, rather than the persons potentially and actually reached by the slip-and-fall negligence standard that has generally been followed in this area.

Gaynor and Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Env. L. & Poly. at n.334.

To protect the innocent from criminal conviction, this Court should grant the writ of certiorari and reverse the lower court.

B. Contrary to the Ninth Circuit, This Court Has Tried to Limit, Not Expand, the Doctrine of "Public Welfare Offenses"

The Ninth Circuit claims its determination that the Clean Water Act is "public welfare legislation," and that such legislation allows criminal conviction without proof of criminal intent, is dictated by Supreme Court precedent. But the Ninth Circuit is wrong. This Court's decision in *Morissette v. United States*, 342 U.S. 246, limits rather than expands the "public welfare offense" doctrine and undercuts the lower court opinion here.

In *Morissette,* the petitioner took some old shell casings from an Air Force bombing range that he believed were abandoned scrap. After selling these casings for $84, Morissette was convicted of "knowingly" stealing and converting government property and sentenced to imprisonment for two months or to pay a fine of $200. The lower court ruled the "knowing" offense did not require a criminal intent, basing its ruling on the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922), leading to the so-called "public welfare offenses." *See Morissette,* 342 U.S. at 250.

This Court acknowledged it had, on occasion, construed mere omission of "any mention of criminal intent as dispensing with it," but this Court reversed the lower court in *Morissette* pointing out with great care the dangers of a verbatim reading of its prior cases:

> If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Id. at 250.

The Ninth Circuit has adopted the literal reasoning of this Court's early precedents to interpret the Clean Water Act and has ascribed more to the "public welfare offense" doctrine than was contemplated by this Court. The lower court's holding that an apparently innocent act may subject the actor to severe criminal liability is inconsistent with any fair-minded philosophy of criminal law and sweeps within its arms a whole array of federal statutes—particularly those designed for natural resource protection—that do not expressly preserve a *mens rea* requirement. An historical review of the "public welfare offense" reveals that modern lower courts have both misunderstood and misapplied the doctrine.

In a 1933 law review article, Francis Bowes Sayre elucidates the genesis of this doctrine and its almost immediate subversion. Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 55-88 (1933). Sayre notes that, before the middle of the nineteenth century, there was no thought on the part of American judges of relaxing the general requirement of a *mens rea*, even for violations of so-called regulatory statutes. *Id.* at 62. For example, in *Myers v. State*, 1 Conn. 502 (1816), a defendant was convicted for renting out a carriage on Sunday under a statute making the action a crime "except from necessity or charity." This Court reversed the conviction on grounds the defendant could not be convicted if he believed the rental was for charity and had no criminal intent.

> Unless this construction be adopted, a man may be convicted of a crime, when he had no intent to

> violate the law, and when his object was to perform a deed of charity conformable to the law. This would oppugn the maxim that a criminal intent is essential to constitute a crime.

Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 62.

Sayre reports that this was the law in the United States down to the middle of the nineteenth century. *Id.*

By the mid-1840's, however, things began to change—decisions appeared holding under certain statutory regulations *mens rea* need not be proved. In *Barnes v. State*, 19 Conn. 398 (1849), decided by the same Connecticut court that allowed the conviction in *Myers v. State*, the court held (without supporting authority) that a defendant could be convicted for selling liquor to a drunkard even if he didn't know the buyer was a drunkard. Similar decisions ensued during the next decade. Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 63.

By the 1860's, the doctrine of "public welfare offenses" became firmly established in Massachusetts relative to liquor and adulterated milk cases. *Id.* at 64. In *Commonwealth v. Boynton*, 2 Allen 160 (Mass. 1861), the defendant was convicted for selling an intoxicating liquor although he didn't know the beverage he sold was intoxicating. Three years later, a Massachusetts court cited *Boynton* for the conviction of a defendant for selling adulterated milk, although the defendant was ignorant of the fact. Based on these decisions, the Massachusetts courts began to extend the doctrine to other types of police regulations. Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 65. By 1868, the doctrine was widely recognized in other states. *Id.* at 66.

Sayre points out, however, that such cases involved:

> a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual

> defendants and punish without proof of any guilty intent.

Id. at 68.

Sayre also points out that the decisions permitting convictions of such "light police offenses," generally involving a small fine, without proof of guilty intent came at a time when the demand of an increasingly complex society required administrative regulation "unrelated to questions of personal guilt." *Id.* at 67. This is true for ordinary traffic violations, the shear number of which would bury the courts if the courts were required to ascertain the intent of the individual in each case. *Id.* at 69.

But in recognizing the necessity of "public welfare offenses" for what Sayre calls "petty violations," he delivers a sharp warning: "The group of offenses punishable without proof of any criminal intent must be sharply limited." Sayre believed the sense of justice of the community would not tolerate the imposition of substantial punishment on the innocent. *Id.* at 70. Unfortunately, many of today's courts, like the Ninth Circuit in this case, don't share Sayre's "sense of justice."

Sayre continues with a question that frames the issue quite nicely in the case at bar:

> How then can one determine practically which offenses do and which do not require a *mens rea*, where the statute creating the offense is entirely silent as to requisite knowledge?

Id. at 72.

Sayre suggests the answer is determined by two principles. The first relates to the character of the offense and the second depends on the possible penalty.

According to Sayre, crimes designed to single out wrongdoers for punishment or correction should require a *mens rea*, whereas police offenses of a merely regulatory nature may be enforced without proof of guilty intent. In the present case, Hanousek's offense was inadvertent. To single him out for so severe a punishment or correction, therefore, serves no public purpose—it neither deters wrongdoing nor reforms guilty conduct.

With respect to the second principle, Sayre maintains if the penalty is serious,

> particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.

Id. at 72.

Thus, under the criteria advanced by Sayre, the Clean Water Act, under which Hanousek was—without guilty intent—convicted and sentenced to jail, does not qualify as "public welfare legislation." To the contrary, to so hold would be "revolting to the community sense of justice."

Sayre presented, but did not invent, these two principles for determining when *mens rea* should be required in a criminal case. Rather, he inferred them from his exhaustive study of the actual decisions of the previous half century. Based on this study, Sayre concludes that "public welfare offenses" have mainly been cases of a regulatory nature that involve only light monetary fines rather than imprisonment. *Id.* at 72. This finding

stands in sharp contrast to the substantial fine imposed on Hanousek of $5,000 and his lengthy sentence of six months in jail, six months in a half-way house, and six months probation.

Sayre suggests further that "public welfare offenses" are also characterized by the fact that evidence of the defendant's actual state of mind would be difficult, if not impossible, to obtain or the offenses require enforcement against virtual armies of offenders for whom discerning state of mind would essentially prevent adequate enforcement. *Id.* at 72. In this case, however, Hanousek's state of mind was determined by a jury—he had no criminal intent.

This case is indicative of a growing trend that Sayre observed decades ago. He notes with alarm an increasing tendency in the courts to expand the "public welfare offense" doctrine to impose substantial penalties for innocent conduct, including imprisonment.

> The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.

Id. at 79.

Sayre's warning proved prescient but understates the real danger. As demonstrated by the case at bar and documented by Gaynor and Bartman, above, today's courts are following the false analogy of "public welfare offenses," not merely "now and

again," but regularly. The lower courts, like the Ninth Circuit in this case, are abandoning criminal law safeguards, especially for unpopular "environmental crimes," and sending ordinary people to prison for ordinary acts for the expedient of easy convictions. This is unconscionable.

Even at the writing of his article in 1933, Sayre remarks that "[i]llustrations of this dangerous tendency are all too frequent." *Id.* at 80. One notable example Sayre gives is the Supreme Court case of *United States v. Balint*, *supra*, relied upon in part by the Ninth Circuit in this case. In *Balint*, this Court held no guilty intent need be proven to convict a person for selling narcotics in violation of the Anti-Narcotic Act, which carries a maximum penalty of five years in prison and $2,000 fine or both. Sayre states this decision "goes far" and can be justified only on the ground of the extreme public disapproval of selling narcotics.

Indeed, this Court agreed with Sayre that *Balint* is an exceptional case. In fact, the Court warns that *Balint* has been taken too far by federal officials and does not justify a general expansion of "public welfare offenses." To the contrary, *Balint* is one of the precedents to which this Court referred in *Morissette* when it said:

> We think a resume of their historical background is convincing that an effect has been ascribed to [our "public welfare offense" cases] more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Morissette, 342 U.S. at 250.

This Court's philosophy of criminal law was clearly and eloquently stated this way:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in

> mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "[b]ut I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51.

History demonstrates that the "public welfare offense" doctrine is a very limited exception to the intent requirement for criminal cases and does not justify the loose and general rule adopted by the Ninth Circuit in this case. To stop this dangerous trend, this Court should grant review and overturn the decision below.

C. Substantial Jail Terms Are Inconsistent with the "Public Welfare Offense" Doctrine

This Court has expressed grave concerns over the proliferation of "public welfare offenses." In *Staples v. United States*, 511 U.S. 600 (1994), this Court held that government must prove that a defendant charged with illegal possession of a machine gun knew his gun met the statutory definition of a machine gun. The Court concluded that possession of a gun (although a deadly device) is innocent conduct and not a "public welfare offense" authorizing strict criminal liability.

This Court emphasized that "public welfare offenses" have been recognized by the Supreme Court in only limited circumstances and chastised the government for ignoring

> the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so

> would 'criminalize a broad range of apparently innocent conduct.'

Id. at 610 (citing *Liparota v. United States*, 471 U.S. 419 (1985)).

This Court also pointed out that "public welfare offenses" are characterized by small penalties that do not gravely damage an offender's reputation and notes:

> [C]ommentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*. *See* R. Perkins, Criminal Law 793-798 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre . . . ("Crimes punishable with prison sentences . . . ordinarily require proof of a guilty intent").

Staples, 511 U.S. at 617.

This Court's unease with sentencing one to prison for acts that do not involve a criminal intent is plain to see from these and other citations. But this Court's misgivings over the expanding doctrine of "public welfare legislation" becomes absolutely acute when the criminal violation amounts to a felony:

> Our characterization of the public welfare offense . . . hardly seems apt, however, for a crime that is a felony . . . . After all, "felony" is . . .'as bad a word as you can give to man or thing.'"

Id. at 618 (quoting 2 F. Pollock & F. Maitland, *History of English Law* 465 (2d ed. 1899)).

To put a point on its concern, this Court stated:

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

Staples, 511 U.S. at 618.

Although this Court did not have to adopt such a definitive rule to decide *Staples*, this Court's sentiment could not have been clearer—felony penalties are not compatible with the theory of "public welfare offenses." This conclusion applies squarely to this case.

The Clean Water Act provision under which Hanousek was convicted imposes felony penalties for a second offense. *See* 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Therefore, under the lower court decision in this case, one can be convicted of a felony for "ordinary" negligence. But under this Court's view expressed in *Staples*, no court should "apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Staples*, 511 U.S. at 618.

It is no argument to suggest that Hanousek was charged "only" with a misdemeanor, because it would not change the interpretation the Ninth Circuit has given the criminal provision under the Clean Water Act. The court cannot read "ordinary negligence" into the same provision one time and then read it out again another time. As this Court explained in *Ratzlaf v.*

United States, 510 U.S. 135 (1994), "[a] term appearing in . . . a statutory text is generally read the same way each time it appears." *Id.* at 143.

Given the apprehension this Court has for an expansive reading of the "public welfare offense" doctrine, this Court should grant the Petition for Writ of Certiorari and address the lower court's overly broad application of that doctrine.

CONCLUSION

Over the past half century, the lower courts have taken this Court's acknowledgment of the "public welfare offense" doctrine in *Morissette* to extremes, finding criminal even the most innocuous conduct. Without the intervention of this Court, the trend will continue at the cost of individual freedom and liberty—a price too high to pay for prosecutorial convenience. This Court should grant review and overturn the lower court decision.

DATED: September, 1999.

Respectfully submitted,

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No. 99-323

In the Supreme Court of the United States

EDWARD HANOUSEK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in order to establish that a defendant "negligently" violated the Clean Water Act, 33 U.S.C. 1319(c)(1), the statute requires the government to prove "gross negligence"—*i.e.*, that the petitioner's conduct was a "gross deviation" from the standard of care that a reasonable person would observe in the situation.

2. Whether Section 1319(c)(1)(A) of the Clean Water Act violates due process by permitting misdemeanor criminal penalties to be imposed based on a standard of ordinary, as opposed to gross, negligence.

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In the Supreme Court of the United States

No. 99-323

EDWARD HANOUSEK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 176 F.3d 1116. The opinion of the district court (Pet. App. 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1999. A petition for rehearing was denied on June 7, 1999 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury convicted petitioner of negligently violating the Clean Water Act's prohibition on the discharge of harmful quantities of oil into navigable waters of the United States, 33 U.S.C. 1321(b)(3), 1319(c)(1), based on his role in causing a rupture of a high-pressure oil

pipeline that resulted in the discharge of thousands of gallons of oil into the Skagway River in Alaska. The court of appeals affirmed the conviction. Pet. App. 1a-22a.

1. The Clean Water Act (CWA) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In pertinent part, the Act prohibits the "discharge of oil or other hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone * * * in such quantities as may be harmful." 33 U.S.C. 1321(b)(3) (1994 & Supp. III 1997). Navigable waters for purposes of 33 U.S.C. 1321(b)(3) (1994 & Supp. III 1997) include all tributaries of traditionally navigable waters. 33 U.S.C. 1362(7); 40 C.F.R. 110.1.

The CWA authorizes a wide array of mechanisms by which the government may enforce the Act's prohibition on the unauthorized discharge of oil into waters of the United States. The Act may be enforced administratively through issuance of administrative compliance orders and imposition of civil administrative penalties. See 33 U.S.C. 1319(a) and (g), 1321(b)(6), 1344. The Act also authorizes the United States to bring a civil enforcement action in federal district court. 33 U.S.C. 1319(b). In such an action, the court may issue an injunction requiring compliance, and it may impose civil penalties of up to $25,000 per day for each violation of the Act, a permit, or an administrative compliance order, 33 U.S.C. 1319(d).

In addition, criminal penalties may be imposed on any person who "negligently" violates the prohibition in Section 1321(b)(3) against discharging harmful quantities of oil into waters of the United States. 33 U.S.C.

1319(c)(1). A first conviction for negligent discharge is a misdemeanor, punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation, imprisonment for not more than one year, or both. 33 U.S.C. 1319(c)(1). Subsequent convictions of the same person for negligent violations may be punished with fines of up to $50,000 per day of violations and imprisonment of up to two years, or both. *Ibid.*

Criminal penalties may also be imposed on any person who "knowingly" violates Section 1321(b)(3). A first conviction for a knowing violation is a felony, punishable by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or both. 33 U.S.C. 1319(c)(2).

2. Petitioner was the roadmaster for the Pacific and Arctic Railway and Navigation Company (PARN), a firm that operated the White Pass and Yukon Railroad. As roadmaster, he was responsible for every detail of the "safe and efficient maintenance and construction" of the railroad and special projects, including, after May 1994, a rock removal project at a site referred to as Six-Mile, so named because it was six miles outside of the town of Skagway, Alaska. Pet. App. 7a. The purpose of the project was to realign a railroad curve and to obtain armor rock in order to extend a cruise ship dock in downtown Skagway. *Ibid.* From at least May 1994 until the oil spill in October 1994, petitioner, as supervisor and foreman of the rock-removal project, directed the day-to-day activities at the Six-Mile site, deciding what employees would be doing, how the rock would be removed, and where it would be placed. Gov't C.A. Br. 5-6.

At the Six-Mile site, a high-pressure oil pipeline, owned by Pacific and Arctic's sister company, the

Pacific and Arctic Pipeline, Inc., was at or above ground and ran parallel to the railroad tracks. The four-inch diameter pipeline was used to transport petroleum products from Skagway, Alaska, to White Horse, Yukon Territory, Canada. The Six-Mile site was located on an embankment 200 feet directly above the Skagway River. Pet. App. 7a; Gov't C.A. Br. 4.

The rock quarrying activity used dynamite to blast rock out of the hills and then used heavy equipment, such as a backhoe, to load the rock over the pipeline onto railroad cars. On occasion in this loading process, rocks would fall either from the backhoe bucket or from the train and alongside the tracks. Before petitioner took over supervisory responsibility for the project in May 1994, railroad ties, sand and ballast material had been placed over and along a 300-foot section of the pipeline in order to protect it. This preparatory precaution was the customary practice when using heavy equipment in the vicinity of the pipeline. After petitioner assumed responsibility for the project in May 1994, and the work area moved further along the tracks, petitioner failed to protect the additional sections of the exposed pipeline in any manner along the 1000-foot work site, except for a platform for a movable backhoe. Pet. App. 7a.

On October 1, 1994, a backhoe operator was engaged in his usual task of using a backhoe to load large rocks over the pipeline onto a train. After the train left, the operator noticed that rocks had fallen near the tracks. He moved the backhoe to sweep the rocks away from the railroad tracks. At this location, the pipeline was unprotected and covered with only a few inches of soil. The backhoe bucket struck the pipeline causing a rupture. As a result, an estimated 1000 to 5000 gallons

of heating oil were discharged over the course of many days into the adjacent Skagway River. Pet. App. 8a.

3. Petitioner was indicted on one count of negligently violating CWA Section 1321(b)(3).[1] In pertinent part, the district court instructed the jury that in order to find the petitioner guilty the government must prove that "[t]he particular defendant caused the discharge of oil" and "[t]he discharge was caused by the negligence of the particular defendant." C.A. E.R., Jury Instruction No. 8. The court defined negligence as follows (C.A. E.R., Jury Instruction No. 10):

> Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use under similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

Petitioner objected to this definition of negligence and contended that "negligently," 33 U.S.C. 1319(c)(1)(A),

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[1] Petitioner was also charged with one count of conspiring to provide false information to government officials in violation of 18 U.S.C. 371, 1001. The jury acquitted petitioner on that count. The government also charged M. Paul Taylor, an officer of Pacific and Arctic Pipeline Inc., with conspiracy to make false statements, six counts of making false statements, and negligently violating the CWA. The district court dismissed the negligent violation count against Taylor. The jury convicted Taylor of two counts of making false statements and acquitted him on the other counts relating to false statements. Gov't C.A. Br. 2. Taylor's appeal is pending before the Ninth Circuit.

must be defined as "a gross deviation from the standard of care that a reasonable person would observe in the situation." Pet. 5. The district court disagreed, holding that the plain language of the statute and the legislative history revealed that Congress intended to impose a simple negligence standard of reasonable care in Section 1319(c)(1)(A). Pet. App. 23a-25a.

A jury convicted petitioner of negligently violating Section 1321(b)(3) by discharging a harmful quantity of oil into a navigable water. The district court sentenced petitioner to six months of imprisonment, six months in a halfway house, and six months of supervised release, as well as a fine of $5000. Pet. App. 9a.

4. On petitioner's appeal, the court of appeals affirmed the conviction and sentence.[2] The court rejected petitioner's challenge to the jury instruction defining negligence. The court concluded that the plain language of the statute evidenced Congress's intent in 33 U.S.C. 1319(c)(1)(A) to impose an ordinary, rather than gross, negligence standard. The court observed that "[t]he ordinary meaning of 'negligently' is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." Pet. App. 10a. The court also reasoned that if Congress had intended to prescribe a heightened negligence standard it could have done so explicitly, as it did in a neighboring provision, 33 U.S.C. 1321(b)(7)(D), which provides for increased civil penalties where a violation is the result of "gross negligence or willful misconduct." Pet. App. 11a. The court further held that an ordinary negligence standard does not violate due process, particularly because the CWA is a public welfare statute. *Id.* at 12a.[3]

[2] The opinion indicated that District Judge Stagg, sitting by designation, intended to file a separate dissenting opinion. Pet. App. 22a n.5. However, a dissenting opinion never issued.

ARGUMENT

No decision by this Court or any other court of appeals addresses, much less conflicts with, the Ninth Circuit's conclusions that Congress intended to impose a simple negligence standard of reasonable care in Section 1319(c)(1)(A) and that this standard does not violate due process. Because the judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. a. Petitioner makes no claim that the Ninth Circuit's interpretation of Section 1319(c)(1)(A) conflicts with any other federal court decision, but does assert that it conflicts with three state court decisions interpreting unrelated state statutes. Pet. 19. No such conflict exists, however. The cases he cites construe the intent of state legislatures rather than Congress, and the state statutory provisions at issue in those cases bear little resemblance to the CWA provision under which petitioner was convicted. *Santillanes* v. *State*, 849 P.2d 358 (N.M. 1993) (felony negligent child abuse statute); *State* v. *Ritchie*, 590 So. 2d 1139 (La. 1991) (negligent homicide); *State* v. *Grover*, 437 N.W.2d 60, 62 (Minn. 1989) (child abuse reporting statute which required reporting when a person "knows or has reason to believe" abuse has occurred did not encompass actor who had reason to know or believe, but negligently failed to recognize abuse).

[3] The court also rejected petitioner's challenges to other jury instructions, to the sufficiency of the evidence, and to the district court's application of the sentencing guidelines. Pet. App. 14a-22a.

b. Petitioner suggests (Pet. 19-20) that the statutory interpretation issue in this case is important because allowing the Ninth Circuit's decision to stand "will lead to difficulty with the proper interpretation and application" of a provision of the Fastener Quality Act, 15 U.S.C. 5408(c)(3), which provides for felony sanctions for negligently failing to maintain records. But the Ninth Circuit's interpretation of the CWA was based not only on the plain meaning of the unadorned word "negligently," but also on the structure and legislative history of the CWA, including the fact that the term "gross negligence" appears elsewhere in the CWA. Thus, the interpretation of the Fastener Quality Act will not necessarily be governed by the holding here and should await a case presenting that question for resolution by the lower courts in the first instance.

c. In any event, the Ninth Circuit's interpretation of Section 1319(c)(1) is correct. Ascertaining the meaning of the term "negligently" in that provision is purely a matter of statutory construction. See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). In this case, Congress's intent is reflected in the plain language and structure of the statute. When Congress wanted to establish a liability standard higher than ordinary negligence for purposes of the CWA, it said so expressly. In Section 1321(b)(7)(D), for instance, Congress rendered a certain category of defendants potentially liable for large civil penalties (not less than $100,000) for any violation of Section 1321(b)(3) that is the result of "*gross* negligence or willful misconduct." 33 U.S.C. 1321(b)(7)(D) (emphasis added). See also 33 U.S.C.

1321(f)(1)-(3) (providing for full recovery of removal costs from owners or operators where the discharge was the result of "*willful* negligence") (emphasis added). The absence of any such modifiers in Section 1319(c)(1), by contrast, leads to the conclusion that Congress intended to base liability under that Section on an ordinary negligence standard. As Representative Harsha stated during consideration of a proposal to expand the scope of the CWA penalty provisions, "I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence." 118 Cong. Rec. 10,644 (1972).

Where, as here, Congress's intent is clear from the plain language of the statute and supported by legislative history, resort to the statutory construction aids on which petitioner relies (Pet. 18) is unnecessary. In any event, the aids do not compel the result petitioner propounds.

Citing *Staples*, 511 U.S. at 605, petitioner argues (Pet. 18) that Section 1319(c)(1) must be construed in light of common law principles, which petitioner claims would require a gross negligence standard. However, because the crime of negligently violating the CWA has no common law crime antecedent, common law principles need not be imported into the CWA. See *Morissette* v. *United States*, 342 U.S. 246, 257, 262 (1952). Moreover, the common law principle on which petitioner relied in the courts below applies to the felony of negligent *homicide*. In framing the misdemeanor provisions of the CWA, Congress was likely to have taken as a model not common law homicide but rather the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, the federal water pollution control statute

that preceded the CWA. The Rivers and Harbors Act has been construed by the lower courts as imposing misdemeanor level penalties under a strict liability regime. See 33 U.S.C. 411 (subjecting any person who "violate[s]" the Act's prohibitions against, *inter alia*, discharging refuse into navigable waters to a potential prison term of up to one year); *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974) (noting that 33 U.S.C. 411 has consistently been construed as a strict liability offense); but cf. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) (reserving question).

Petitioner argues (Pet. 18) that the hierarchical penalty scheme under the CWA implies that a more culpable standard than ordinary negligence is necessary to support a conviction under Section 1319(c)(1). Petitioner's argument, however, misses the mark. It is well settled that civil liability under Section 1319 may be imposed on a strict liability basis. See, *e.g.*, 33 U.S.C. 1319(d) (providing civil penalties for "[a]ny person who violates," *inter alia*, certain enumerated provisions of the Act); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (interpreting CWA as imposing strict liability in civil cases); *Stoddard* v. *Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). By contrast, "negligent[]" violations of the Act may be subject to misdemeanor level sanctions, 33 U.S.C. 1319(c)(1), and "knowing[]" violations may be subject to felony prosecutions, 33 U.S.C. 1319(c)(2).[4]

[4] Under the CWA's knowing endangerment provision, 33 U.S.C. 1319(c)(3), any person who "knowingly violates" the Act, and "who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury," may be subject to even more severe penalties than those allowed under Section 1319(c)(2).

Thus, although the need to preserve the hierarchical penalty structure may explain why Congress determined that negligence—rather than the strict liability scheme of the Rivers and Harbors Act—should be the predicate for misdemeanor liability, *any* negligence-based standard would preserve that hierarchical structure. The CWA's hierarchical penalty structure, therefore, provides no support for petitioner's claim that misdemeanor liability requires a showing of gross negligence.

Finally, contrary to petitioner's suggestion (Pet. 18), neither the rule of lenity nor the rule that statutes be construed to avoid substantial questions of constitutionality applies here, because there is no "grievous ambiguity" in the statute, see *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), and there is no substantial constitutional impediment to Congress's imposing a simple negligence standard, see pp. 11-15, *infra*.[5]

2. a. Petitioner identifies no split of authority on the question whether Congress may constitutionally impose misdemeanor level penalties based on an ordinary negligence standard. Petitioner merely asserts that any such scheme would violate the Due Process Clause, and he urges this Court to grant certiorari in order to

[5] Petitioner baldly asserts (Pet. 18) that a gross negligence standard is required to avoid unreasonable results. Application of the CWA in this circumstance does not offend reason or common sense. The petitioner is in a specialized occupation in a heavily regulated area, under which he directed and oversaw on a daily basis a project that involved exploding dynamite and removing large rocks using heavy equipment alongside an unprotected, high-pressure fuel pipeline. The jury found that the substantial oil spill was the inevitable result of petitioner's conduct in disregarding customary safety precautions while managing the project. The verdict is not an example of unreasonable application.

"flesh out the constitutional scope of mens rea." Pet. 16.[6]

Petitioner's second question presented asks whether it violates due process to "eliminat[e] mens rea for offenses punishable by significant terms of imprisonment of one year or more." Pet. i. That question, however, mischaracterizes the issues actually presented by this case in two respects. First, petitioner's offense of conviction was for a first-time negligent violation of the Act, which is punishable by a *maximum* of one year imprisonment, not "one year or more." Pet. i.[7] Second, petitioner incorrectly equates negligence with a "rigorous form of strict liability" standard, Pet. 16

[6] Petitioner suggests (Pet. 15) that the present case provides a vehicle for resolving an asserted conflict among the courts of appeals as to whether the Migratory Bird Treaty Act (MBTA) violates due process by imposing felony level sanctions based on strict liability. *Ibid.* (citing *United States* v. *Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985), and *United States* v. *Engler*, 806 F.2d 425, 434-435 (3d Cir. 1986), cert. denied, 481 U.S. 1019 (1987)). This Court, however, does not grant review to issue advisory opinions regarding statutory provisions at issue in other cases. In any event, review of this case would have no impact on the cited MBTA cases. Aside from the fact that the MBTA provision in question was based on strict liability, not negligence, and involved a felony offense, not a misdemeanor, any conflict with respect to the scienter requirement under the MBTA was resolved by Congress in 1986, when it added a "knowing" intent requirement to the felony prohibition in response to the *Wulff* and *Engler* decisions. See Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, Tit. V, § 501, 100 Stat. 3590 (16 U.S.C. 707(b)).

[7] Whether it would be consistent with due process, in a particular case, to impose a felony-level sanction of up to two years of imprisonment on a person who, despite having already been convicted of a negligent violation of the CWA, proceeds to commit subsequent negligent violations of the Act, see 33 U.S.C. 1319(c)(1), is not presented in this case.

(quoting *Staples*, 511 U.S. at 607 n.3), *i.e.*, one that completely "eliminat[es] mens rea." Pet. i. To the contrary, negligence is itself among the traditional categories of criminal mental states. See *Liparota*, 471 U.S. at 423-424 n.5 (noting that the Model Penal Code recognizes four mental states: purpose, knowledge, recklessness, and negligence); *United States* v. *Ayo-Gonzalez*, 536 F.2d 652, 656 (1st Cir. 1976) (statute that eliminates mens rea is one that does not incorporate any "form of culpability, including negligence, as an element"), cert. denied, 429 U.S. 1072 (1977). The issue here is not, as petitioner frames it, whether a strict liability standard would contravene due process. Unlike strict liability, negligence incorporates an element of blameworthiness because it occurs only when a defendant deviates from the standard of care which a person can reasonably be expected to exercise in the situation.

In any event, this Court has stated that "where one deals with others and his mere negligence may be dangerous to them," strict liability does not offend due process. *United States* v. *Balint*, 258 U.S. 250, 252 (1922); see also *Morissette* v. *United States*, 342 U.S. 246, 256 (1952); *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943); see generally *United States* v. *Unser*, 165 F.3d 755, 762-763 (10th Cir. 1999), cert. denied, No. 98-1600 (Oct. 4, 1999) (citing cases such as *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960)).[8] If strict

[8] Petitioner identifies only one case holding that a strict liability standard violated due process, *Lambert* v. *California*, 355 U.S. 225 (1957). Cf. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 537 n.33 (1982) (suggesting *Lambert* has limited application). *Lambert* held that due process was violated by a state statute imposing strict criminal liability for failing to register as a felon even though the defendant did not know of the duty to register. *Lambert* does not hold, however, that strict liability crimes are constitutionally impermis-

liability satisfies due process, then ordinary negligence must as well. See *State* v. *Hazelwood*, 946 P.2d 875, 884 & n.17 (Alaska 1997) (holding that negligence standard in analogous state-law context satisfies due process because "criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter" and the "overwhelming majority of jurisdictions allow crimes based on ordinary negligence").

b. Petitioner claims (Pet. 15-16) that due process is violated by the application of an ordinary negligence standard in this case, under the factors set forth in *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960), to evaluate the constitutionality of strict liability offenses. To the contrary, under the *Holdridge* criteria, Section 1319(c)(1)(A) comports with due process. Section 1319(c)(1)(A) is a "statutory crime * * * not taken over from the common law." *Ibid.* The penalty is "relatively small" because it is a misdemeanor. *Ibid.* As discussed above, Congress intended to impose an ordinary negligence standard. An ordinary negligence standard meets the statutory purpose by deterring conduct that would cause harmful pollution to waters of the United States. Furthermore, "the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person." *Ibid.* It is reasonable to expect persons to act in a non-negligent way, particularly where, as here, the defendant was responsible for a construction project that involved blasting and using heavy equipment around a high-pressure fuel pipeline located next to a river.

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sible. *Lambert*, 355 U.S. at 228. Moreover, petitioner does not suggest that *Lambert* controls this case.

Petitioner asserts that it violates due process to criminally punish him for a "simple accident someone else caused." Pet. 17. However, as the Ninth Circuit found, the jury instructions made clear that the petitioner "could be convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others" and required the jury to find that petitioner's own negligence caused the oil spill. Pet. App. 15a-16a. Furthermore, the court of appeals found sufficient evidence supporting the jury's finding that petitioner's negligence caused the oil spill. *Id.* at 18a-20a. Testimony at trial established that the customary safety practice when working with heavy equipment in the vicinity of a high-pressure fuel pipeline is to build protections around the pipeline to prevent ruptures in the event of contact with heavy machinery or rock, rather than simply relying on machine operators not to make contact with the pipeline that they are working over and around. In the haste to quarry the rock at Six-Mile, petitioner failed to take the customary safety precautions. Thus, petitioner's claim that the ordinary negligence standard does not satisfy constitutional due process is without merit.

3. Petitioner claims that review is warranted to resolve a conflict among the circuits as to whether the CWA "is a 'public welfare' statute eliminating mens rea as a requirement for criminal convictions." Pet. 7. To the contrary, there is no conflict on any issue that would affect the court of appeals' holdings in this case.

a. To begin with, there is no conflict among the courts as to whether, in petitioner's words, the CWA "eliminat[es] mens rea as a requirement for criminal convictions." Pet. 7. Petitioner's alleged conflict presupposes that the courts which have characterized the CWA as a public welfare offense have eliminated mens

rea and instead imposed "strict criminal liability." Pet. 10. Petitioner, however, is in error. No court, regardless of whether it has characterized the CWA as a public welfare statute, has held that any of the CWA's criminal provisions impose strict liability.[9]

b. Petitioner relies (Pet. 10) on a single decision by the Fifth Circuit, *United States* v. *Ahmad*, 101 F.3d 386, 391 (1996), as the contrary decision that he believes creates a conflict with the present case. *Ahmad* addressed the meaning of a "knowing" violation of the CWA, see 33 U.S.C. 1319(c)(2)(A), and did not involve or purport to address the standard for negligence under the CWA. Thus, this case presents no conflict with *Ahmad*.

Ahmad departed from the analysis in the present case only to the extent that it is the only court of

[9] As noted below, the cases cited by petitioner (Pet. 9-10) deal exclusively with the level of knowledge required to establish a felony "knowing" violation of the CWA pursuant to 33 U.S.C. 1319(c)(2)—a statutory provision which is not at issue here. The courts in those cases did not opine on the meaning of the term "negligently" in 33 U.S.C. 1319(c)(1), nor did they address whether imposing misdemeanor level penalties based on an ordinary negligence standard would violate due process. Moreover, to the extent that their analyses of the "knowingly violates" provision of the CWA was informed by the "public welfare offense" doctrine, not one of those courts construed the CWA as eliminating mens rea or imposing the form of truncated strict liability described in *Staples*, whereby the defendant is not required to "know the facts that make his conduct fit the definition of the offense." *Staples*, 511 U.S. at 608 n.3; see also *id.* at 612 n.6. See, *e.g.*, *United States* v. *Sinskey*, 119 F.3d 712, 717 (8th Cir. 1997) ("requiring the government to prove only that the defendant acted with awareness of his or her conduct does not render § 1319(c)(4) a strict liability offense"); *United States* v. *Wilson*, 133 F.3d 251, 263 (4th Cir. 1997) ("Even under this public welfare doctrine, however, true or rigid strict liability does not generally follow.").

appeals decision to state that the CWA is not a public welfare statute. However, the Fifth Circuit's determination in *Ahmad* that the CWA does not define a public welfare offense does not conflict with the holding in the present case. In *Ahmad*, as in the other cases cited by petitioner (Pet. 9-10), the court addressed whether the meaning of "knowingly violates" in 33 U.S.C. 1319(c)(2)(A) should be construed in light of the principles that underlie "public welfare" offenses. While the *Ahmad* Court decided that the statutory analysis at issue there should not be guided by the public welfare offense doctrine, the ultimate holding in that case—that a "knowing" violation of the Clean Water Act requires knowledge of the facts underlying the nonjurisdictional elements of the offense—has no bearing on the question presented here, *i.e.*, whether Congress intended the standard of negligence in 33 U.S.C. 1319(c)(1) to be ordinary or gross.[10] Furthermore, to the extent that petitioner alleges that the courts of appeals have been inconsistent in their analyses of the meaning of "knowingly violates" in the CWA, 33 U.S.C. 1319(c)(2), any such inconsistency among the courts with respect to a statutory provision that is irrelevant to the instant prosecution would not provide a basis for further review in this case.[11]

[10] In the instant case, the Ninth Circuit found it unnecessary to resort to the public welfare doctrine as an aid to statutory interpretation. The court instead found that the plain language of the statute and legislative history alone were sufficient to conclude that the unadorned phrase "negligently violate" means ordinary negligence. Accordingly, the characterization of the CWA as a public welfare statute was not a factor in the Ninth Circuit's statutory interpretation in this case.

[11] In any event, the court of appeals' characterization of the CWA as a public welfare statute in this case was correct. Most

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

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public welfare offenses impose penalties for mishandling "deleterious devices or products or obnoxious waste materials," which by their very nature "put their owners on notice that they stand 'in responsible relation to a public danger.'" *Staples*, 511 U.S. at 611 (citations omitted). In such statutes, Congress intends for the defendant's familiarity with the regulatory requirements to be presumed so that the public health and safety may be fully protected. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). As the Second Circuit noted, "[t]he vast majority of the[] substances [subject to criminal regulation under the CWA] are of the type that would alert any ordinary user to the likelihood of stringent regulation." *United States* v. *Hopkins*, 53 F.3d 533, 539 (1995), cert. denied, 516 U.S. 1072 (1996). Moreover, as the Ninth Circuit observed, Congress was keenly aware that "the improper and excessive discharge of * * * [pollutants] can have serious repercussions for public health and welfare," and that the "dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger." *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1994) (citing legislative history), cert. denied, 513 U.S. 1128 (1995). For these reasons, every court of appeals, except the Fifth Circuit, has correctly characterized the CWA as a public welfare statute.

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No. 99-323

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD HANOUSEK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts promoting a limited and accountable government, and opposing overreaching by those administrative agencies and courts which act contrary to the plain meaning of the language chosen by Congress in the substantive statutes at issue.

WLF has participated as *amicus curiae* in numerous environmental cases, including those involving criminal application of the Clean Water Act ("CWA"). *See, e.g., Weitzenhoff v. United States*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied sub nom., Mariani v. United States*, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). WLF vigorously opposes the arbitrary use of criminal prosecution, especially where administrative and civil remedies are available to resolve alleged regulatory infractions.

WLF is able to bring a broader perspective to this case than the parties and presents additional reasons why this Court should grant the Petition, including the important issue of whether the Government must prove a defendant's criminal intent to convict the defendant of "negligently violating" the Clean Water Act.

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief.

This brief is being filed with the consent of all the parties. Letters of consent are on file with the Clerk of this Court.

INTRODUCTION AND STATEMENT OF THE CASE[2]

Edward Hanousek, Jr. has petitioned this Court to review his criminal conviction under the Clean Water Act for which he received the *maximum* sentence -- twelve months imprisonment (six months incarceration and six months confinement in a halfway house) and an additional six months of supervised release. WLF urges this Court to grant certiorari, not simply because the conviction and sentence are unconscionable, but because the Ninth Circuit, in affirming Mr. Hanousek's conviction, has set a precedent which violates due process.

In 1994, Mr. Hanousek's employer, the Pacific & Arctic Railway Company ("PARN") hired an independent contractor, Hunz & Hunz ("H&H"), to straighten a 1000-foot section of track on the White Pass & Yukon Railroad line. The operation involved removal of rock outcroppings and disposal of the resulting debris. H&H employees used backhoes to load debris from the operation into rail cars for transport off-site. A petroleum pipeline, not owned or operated by either PARN or H&H, runs adjacent to this section of track. To prevent damage to the pipeline, H&H placed a protective cover (consisting of railroad ties, sand and

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[2] The facts set forth herein were extracted from the Ninth Circuit's opinion in *United Stated v. Hanousek*, the Petition for Certiorari, and the Petitioner's Opening Brief filed in the Ninth Circuit. Although WLF concurs with Petitioner's Statement of the Case, certain facts merit additional emphasis.

ballast material) over a 300-foot section of the pipeline. In addition, H&H created a work platform of sand and gravel from which the backhoe was operated. According to one of the H&H backhoe operators, the project never required the backhoe to leave the work platform.

Sometime after H&H had commenced working on the project, PARN hired Mr. Hanousek as a "roadmaster" for the White Pass & Yukon Railroad. In this position, one of Mr. Hanousek's responsibilities was overseeing the work being performed by H&H. Hanousek directed *what* work was to be done by H&H, but he did not direct *how* it was to be done. As an independent contractor, it was H&H's responsibility to perform the work in a professional manner.

One evening, an H&H backhoe operator noticed a few rocks laying alongside the track near the pipeline approximately 100 yards from the active work site area. Instead of walking over on foot to move the rocks by hand, the backhoe operator apparently decided it would be easier to move the rocks with the backhoe. Accordingly, the H&H employee drove the backhoe off of the work platform, rumbled 100 yards to the location of the debris, and attempted to sweep the rocks away from the tracks with the backhoe bucket. Unfortunately, the backhoe bucket accidentally struck and cracked an unprotected section of the pipeline, causing a leak. The backhoe operator immediately radioed the pipeline's pump station, and the pipeline was shut down within a few minutes. Nevertheless, witnesses reported seeing a sheen of oil on a nearby Skagway River after the accident.

The H&H backhoe operator did not tell Hanousek about the rock debris, nor ask for guidance on how to clear such debris. Hanousek was not even in the area when the accident occurred. Rather, he was off duty and at home.

Nevertheless, Hanousek was convicted of "negligently" violating the Clean Water Act's prohibition on discharging oil in harmful quantities to "navigable waters," 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3) (1994).

The district court instructed the jury that to find Hanousek guilty, they need only conclude that the discharge was caused by Hanousek's negligent conduct -- defined by the district court as the failure to use reasonable care. It is not clear from the Ninth Circuit's opinion what Hanousek did -- or did not do -- that constituted the negligent act. WLF does not intend to dwell on that troubling question. Rather, WLF's focus is the Ninth Circuit ruling that the Government need only prove ordinary negligence, rather than criminal negligence, to convict Hanousek because the Clean Water Act is "public welfare legislation." *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999).

SUMMARY OF ARGUMENT

The general rule is that to obtain a criminal conviction, the Government must prove beyond a reasonable doubt that the defendant possessed a criminal state of mind -- *mens rea*. But, as the Ninth Circuit notes, the "public welfare doctrine" creates the following exception to this rule: The Government need not prove *mens rea* as an element of a crime where a defendant is involved in an activity which the defendant should know may result in severe damage or injury to public welfare.

Due process, however, must operate as a "governor" of the public welfare doctrine. A fundamental axiom of due process is that ordinary citizens must be given fair warning of what constitutes a criminal offense. Such fair warning is lacking in the case of the Clean Water Act's "negligence" provision. Ordinary citizens do not possess the specialized

knowledge necessary to distinguish lawful from unlawful discharges under the Clean Water Act's complex regulatory framework. Such complexity alone conflicts with the rationale for applying the "public welfare" doctrine -- *i.e.*, the presumption that the actor should know his activity poses a danger to society and is heavily regulated -- and instead warrants application of the general rule that the Government must prove a defendant's criminal intent to sustain a criminal conviction.

The due process limitation on the public welfare doctrine is brought into sharp relief in cases like the present one, where successive acts by independent actors combine to cause the violation. According to the Ninth Circuit, Mr. Hanousek "negligently violated" the Clean Water Act prohibition against discharging oil to navigable waters, notwithstanding that an H&H employee, not Mr. Hanousek, was the party that accidentally discharged the oil. Not only does this holding conflict with the plain language of the Clean Water Act's criminal provision (which applies to the person discharging the oil), but it also runs roughshod over a fundamental tenet of the public welfare doctrine, namely, that *mens rea* may be eliminated only where the defendant stands in a position that "places him in responsible relation to a public danger, such that he should be alerted to the probability of strict regulation." *Staples v. United States*, 511 U.S. 600, 607 (1994). Mr. Hanousek -- a "roadmaster" in charge of railroad tracks -- is not an environmental manager for the pipeline company, nor one whose position even arguably includes environmental responsibilities.

The Court was last presented with the question of whether the Clean Water Act is public welfare legislation in 1994 when the Ninth Circuit's decision in *Weitzenhoff v. United States*, 35 F.3d 1275, was the subject of a petition for writ of certiorari. The Court declined to review the Ninth

Circuit decision affirming a Clean Water Act conviction of the defendant for "knowing" violation without a showing of criminal intent to violate the law. 513 U.S. 1128 (1995) (*sub nom., Mariani v. United States*). Since that time, confusion over whether the Clean Water Act is a public welfare statute has become pronounced. As the petitioner states, the circuits are divided on the issue.

There is now a compelling need for guidance from the Supreme Court. This need is magnified by the fact that similar criminal provisions are found in other, equally far-reaching statutes, such as the Clean Air Act, 42 U.S.C. § 7413(c). Without the Court's guidance, we risk criminalizing conduct that, to the average citizen, would not be perceived as criminal. One need not conjure up a parade of horribles to illustrate the danger. It cannot get much worse than the facts of this case.

REASONS FOR GRANTING THE WRIT

I. THE CLEAN WATER ACT IS NOT "PUBLIC WELFARE" LEGISLATION

A. The Public Welfare Doctrine Always Has Been Limited to Inherently Dangerous Activities For Which the Penalty is Light

The antecedents of the public welfare doctrine are interwoven with the rise of the industrial age, which transformed a primarily agrarian society into one dominated increasingly by mechanization and dependence on care expected of third parties. That transformation had benefits, but also costs. Society faced new dangers, which the laws were ill equipped to prevent -- tainted foods could be packaged and quickly delivered to a large number of people;

water poisoned with *e coli* bacteria could be piped to an unsuspecting public.

The earliest cases to articulate the public welfare doctrine come from the English courts. For example, in *Regina v. Woodrow*, 15 M. & W. 404 (Exch. 1846), a criminal action was brought against a tobacco dealer to enforce a forfeiture of £200 for possessing adulterated tobacco. The Court of Exchequer held the respondent liable even though he proved that he had purchased the tobacco as genuine, and "had no knowledge or cause to suspect" that it was not so. "It is very true," said Baron Parke, "that it may produce mischief because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so." The penalty in *Regina v. Woodrow* involved *no* possibility of imprisonment, the prohibited conduct caused a very direct and widespread public annoyance, and the existence of a *mens rea* was peculiarly difficult if not impossible for the state to prove.

Seventy-six years later, this Court carved out the same exception to the otherwise applicable rule that proof of criminal intent is a prerequisite to criminal conviction. In *United States v. Balint*, 258 U.S. 250 (1922), the Court held that the Government did not have to prove *men rea* to convict a defendant of selling opium without a registration required under the Narcotics Act of 1917: "[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells." *Id.* at 252-53.

This Court's articulation of the doctrine has not materially changed since that time, except to clarify that a defining characteristic of public welfare legislation is that the criminal offense typically involves little or no imprisonment. *See, e.g. Morissette v. United States*, 342 U.S. at 256 (1952) ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"); *Staples v. United States*, 511 U.S. 600, 616, 618 (1994) ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement"). *See also United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

B. The Ninth Circuit Misapplied The Public Welfare Doctrine To The Clean Water Act

The "negligent violation" provision of the Clean Water Act does not fit the profile of public welfare legislation. The potential punishment for criminal violations is *anything* but light; and the materials and activities subject to regulation are *not* of a nature that one should be presumed to be aware. More fundamentally, the public welfare doctrine's rationale for eliminating the *mens rea* requirement does not apply to the present case where the defendant is not the party handling a dangerous substance or engaging in a dangerous activity. Under such circumstances, it is indefensible to presume the requisite intent on the part of this defendant.

1. Punishment for negligent discharges is not light.

Under the criminal enforcement provisions, a first offender who "negligently violates" any of the many substantive requirements of the Clean Water Act may be fined $25,000 per day per violation and imprisoned for up to one year. 33 U.S.C. § 1319(c)(1). For second violations, the maximum penalty is $50,000 per day and up to three years imprisonment. Thus, with felony-length sentences possible, one could hardly characterize the punishment for violations as light.

The possibility of a lengthy sentence for a minor violation of the Clean Water Act is not merely theoretical. Under the United States Sentencing Guidelines, § 2Q1.2 and § 2Q1.3, first offenders are routinely sentenced to lengthy prison terms for minor regulatory offenses that do not perceptibly threaten human health. For example, in *United States v. Mills*, a father and son were sentenced to prison for 21 months for placing clean building sand on a quarter-acre lot that EPA deemed to constitute a wetland. 817 F. Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd*, 904 F.2d 713 (11th Cir. 1994). In short, by any standard the punishments meted out under the Clean Water Act are severe in proportion to the harm caused by the offense and the culpability of the defendant.

2. The conduct proscribed by the Clean Water Act is not apparent to the average citizen.

The reach of the Clean Water Act is so broad that only an environmental expert could be expected to distinguish between lawful and unlawful discharges. Two CWA requirements subject to criminal punishment illustrate

the point, specifically: (1) the prohibition against the discharge of "pollutants" to "navigable waters" without a CWA permit (33 U.S.C. § 1311); and (2) the prohibition against the discharge of oil and "hazardous substances" to "navigable waters" (33 U.S.C. § 1321(b)(3)) (the provision allegedly violated by Mr. Hanousek). The seemingly simple phrases used in these two CWA prohibitions belie a complex, ever-changing maze of regulation that has created decades of work for thousands of environmental lawyers and consultants.

Under the Clean Water Act, "navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). EPA and the United States Army Corps of Engineers (the "Corps"), which share regulatory authority under the Clean Water Act, each have promulgated regulations broadly defining "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce." *See* 40 C.F.R. § 122.2 (EPA definition); 33 C.F.R. § 328.3 (Corps definition).

Many of the terms used in the EPA/Corps definition of "waters of the United States" also have been defined expansively, such as the term "wetland." Under EPA and Corps regulations, the term "wetland" encompasses dry land that supports "vegetation typically adapted for life in saturated soil conditions" ("hydrophytic vegetation"). *See* 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b). Identifying "hydrophytic vegetation" is so complicated that in 1987 the Corps published a several-hundred page manual to "ensure

consistent regulation of wetlands."[3] One year later, EPA published its own procedures for identifying and delineating wetlands.[4]

Similar complexities abound in identifying the "pollutants" for which one must obtain a permit before discharging to "navigable waters" (33 U.S.C. § 1311). The "pollutants" that one may not discharge without a permit include far more than simply "obnoxious waste materials" (quoting from *Int'l Minerals*, *supra*) that pose patent dangers to water quality. Indeed, the term "pollutant" is defined so broadly that virtually *anything* one discharges to "waters of the United States" requires a permit.[5] As the five dissenting judges in *United States v. Weitzenhoff* observed, one could violate the Clean Water Act prohibition on unpermitted discharges of "pollutants" simply by "skipping a stone into a lake" or "pouring hot stale coffee down the drain." 35 F.3d at 1298.

It is no easier to identify "hazardous substances" the discharge of which is absolutely prohibited (33 U.S.C. § 1321(b)(3)). The list of "hazardous substances" subject to the absolute discharge prohibition under the Clean Water Act is populated with substances that few would regard as inherently dangerous or hazardous -- *e.g.*, copper

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[3] U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987).

[4] EPA, *Wetland Identification and Delineation Manual* (1988).

[5] The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

and nickel. *See* 40 C.F.R. § 302.4, Appendix A. Complicating matters further, EPA has amended the list countless times. Environmental professionals spend considerable time tracking such changes and modifying corporate compliance procedures as appropriate.

Not even an environmental professional could be expected to know all of the nuances of the Clean Water Act, much less a layman like Mr. Hanousek.

3. The Ninth Circuit's interpretation of "negligently" is not appropriate in the criminal context.

Perhaps the most troubling aspect of the Ninth Circuit's decision is the notion that an individual can be criminally prosecuted for "negligently" discharging a regulated substance where the individual is not the party that discharged or directed the discharge of the substance. Rather, under the Ninth Circuit holding, anyone can be imprisoned for a negligent act or omission which, in combination with another's subsequent negligent act, causes a discharge of a regulated substance. That means that someone like Mr. Hanousek, a "roadmaster" who is far removed the world of "hazardous substances," "pollutants," and "navigable waters," goes to jail if he makes a mistake which is ruled to be a proximate cause of a prohibited discharge. Such a construction impermissibly cleaves apart the criminal act -- "negligently violates" -- from the actor ("Any person who") in a way that Congress could not have intended.

In previous cases where this Court has held an individual criminally liable for an offense in which the individual did not directly participate (*e.g.*, shipping or labeling adulterated drugs), the Court relied on the theory that one who aids and abets a violation is as guilty as the

principal. *See United States v. Dotterweich*, 320 U.S. 277, 281, 284 (1943) (holding corporate officer liable for aiding and abetting a violation). Negligent supervision of a subcontractor whose subsequent negligence violates the Clean Water Act does not constitute "aiding and abetting" the violation. *See Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949) ("[T]o aid and abet another to commit a crime, it is necessary that a defendant must 'participate in it as in something he wishes to bring about, that he seek by his action to make it succeed'") (citations omitted). *See also United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1337 (Fed. Cir. 1999) (holding that one cannot negligently aid and abet a negligent violation through mere contributory negligence).

In sum, the Ninth Circuit's application of the "public welfare doctrine" to the Clean Water Act "negligent violation" provision violates due process. The Government must prove more than ordinary negligence on the part of a defendant to obtain a criminal conviction.[6]

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[6] Lest there be any concern that polluters will run rampant without the threat of criminal conviction based on an ordinary negligence standard, the Clean Water Act's elaborate civil enforcement scheme forecloses that scenario. EPA may prosecute CWA violators through any of three possible mechanisms: (1) EPA may seek administrative penalties of up to $10,000 per day per violation in a hearing before an administrative law judge (33 U.S.C. §§ 1319(g) and 1321(c)(6)); (2) EPA may seek civil penalties of up to $25,000 per day per violation in federal district court (33 U.S.C. §§ 1319(d) and 1321(c)(7)); and (3) EPA may issue administrative orders ("cease and desist orders") or pursue injunctive relief in federal district court (33 U.S.C. §§ 1319(a), (b) and 1321(e)).

II. THE IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION REACH BEYOND THE CLEAN WATER ACT

A. The Clean Air Act Has A Similar Criminal Provision

The implications of *United Stated v. Hanousek* are not limited to the Clean Water Act. The Clean Air Act also contains criminal enforcement provisions, which punish individuals for negligent conduct. Specifically, any person who "negligently releases into the ambient air any hazardous air pollutant" and thereby "negligently places another person in imminent danger" may be imprisoned for up to one year. For second offenses, the maximum punishment is two years. *See* 42 U.S.C. § 7413(c)(4).

Criminalizing ordinary negligence under the Clean Air Act would violate due process for the same reasons that criminalizing ordinary negligence under the Clean Water Act violates due process -- namely, the penalties are severe, the conduct proscribed is not readily understood by the average citizen, and one need not even be the "releaser" to be guilty.

B. The Ninth Circuit's Decision Will Have a Negative Impact on Environmental Protection

In addition to incorrectly presuming knowledge of a complex regulatory scheme by an individual whose position does *not* "place him in responsible relation to a public danger" (*i.e.*, environmental damage), the *Hanousek* decision sends a troubling message to those charged with environmental management.

The pervasiveness and complexity of environmental regulation has created an expression among the

environmental managers whose job is to ensure their employer complies with those regulations: "Be a manager, go to jail." If *United States v. Hanousek* is allowed to stand, this gallows humor comes frighteningly close to being the truth. To paraphrase the dissent in *United States v. Weitzenhoff*, it would impose on these vitally important protectors of the environment a massive legal risk, unjustified by law or precedent. 35 F.3d at 1298. Do we enhance environmental protection by incarcerating citizens for a simple error in judgment? Or does such a prosecution actually undermine environmental protection by setting the threshold for criminal conduct so low that we will discourage people from serving in a corporate environmental capacity?

CONCLUSION

For the foregoing reasons, and those discussed in the Petition for a Writ of Certiorari, the Court should grant review.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

EDWARD HANOUSEK, JR *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–323. Decided January 10, 2000

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE O'CONNOR joins, dissenting from the denial of certiorari.

In 1994, petitioner Edward Hanousek, Jr., was employed by the Pacific & Arctic Railway and Navigation Company as the roadmaster of the White Pass & Yukon Railroad. In that capacity, petitioner supervised a rock quarrying project at a site known as "6-mile," which is located on an embankment 200 feet above the Skagway River six miles outside of Skagway, Alaska. During rock removal operations, a backhoe operator employed by Hunz & Hunz, an independent contractor retained before petitioner was hired, accidentally struck a petroleum pipeline near the railroad tracks. The operator's mistake caused the pipeline to rupture and spill between 1,000 and 5,000 gallons of oil into the river.

Petitioner, who was off duty and at home when the accident occurred, was indicted and convicted under the Clean Water Act (CWA or Act), 86 Stat. 859, 33 U. S. C. §§1319(c)(1)(A), 1321(b)(3), for negligently discharging oil into a navigable water of the United States.[1] Petitioner was fined $5,000 and sentenced to sequential terms of six

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[1]Section 1319(c)(1)(A) provides that anyone who "negligently [violates certain provisions of the CWA] shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." Section 1321(b)(3) prohibits "[t]he discharge of oil . . . into or upon the navigable waters of the United States."

months imprisonment, six months in a halfway house, and six months of supervised release. On appeal, petitioner argued, among other things, that it would violate his due process rights to impose criminal liability for ordinary negligence in discharging oil into the river.

In rejecting the due process claim, the Court of Appeals reasoned, in part, that the criminal provisions of the CWA are "public welfare legislation" because the CWA "is designed to protect the public from potentially harmful or injurious items" and criminalizes "'a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.'" 176 F. 3d 1116, 1121 (CA9 1999) (quoting *Liparota* v. *United States*, 471 U. S. 419, 433 (1985)). Whether the CWA is appropriately characterized as a public welfare statute is an issue on which the Courts of Appeals are divided. Compare, *e.g.*, *United States* v. *Kelley Technical Coatings, Inc.*, 157 F. 3d 432, 439, n. 4 (CA6 1998) ("[V]iolations of the CWA fit squarely within the public welfare offense doctrine"), and *United States* v. *Weitzenhoff*, 35 F. 3d 1275, 1286 (CA9 1993) ("The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution . . . and as such fall within the category of public welfare legislation"), with *United States* v. *Ahmad*, 101 F. 3d 386, 391 (CA5 1996) (rejecting the argument that the CWA is public welfare legislation).

Whatever the merits of petitioner's underlying due process claim, I think that it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute. We have said that "to determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" *Staples* v. *United States*, 511 U. S. 600, 613, n. 6 (1994). See also *id.*, at 628–629 (STEVENS, J., dissenting) ("'Public welfare' offenses . . . regulate 'dangerous or deleterious devices or products or obnoxious waste materials'") (quoting *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 565 (1971)). Although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. This fact strongly militates against concluding that the public welfare doctrine applies. As we have said, "[e]ven dangerous items can, in some cases, be so commonplace and generally available" that we would not consider regulation of them to fall within the public welfare doctrine. *Staples*, 511 U. S., at 611. I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.

We have also distinguished those criminal statutes within the doctrine of "public welfare offenses" from those outside it by considering the severity of the penalty imposed. See, *e.g.*, *id.*, at 616–618. We have said, with respect to public welfare offenses, that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette* v. *United States*, 342 U. S. 246, 256 (1952). See also Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933) (stating that it is a "cardinal principle" of public welfare offenses that the penalty not be severe). The CWA provides that any person who "negligently" violates the Act may be imprisoned for up to one year. §1319(c)(1). A second negligent violation of the Act may subject a person to imprisonment for up to two years. *Ibid.* The CWA also contains a felony provision that provides that any person who "knowingly" violates §1321(b)(3) "shall be punished by

a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both." §1319(c)(2).[2] The seriousness of these penalties counsels against concluding that the CWA can accurately be classified as a public welfare statute.

The Court of Appeals disregarded these factors, and relied instead on our previous statements that public welfare offenses regulate "'conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.'" 176 F. 3d, at 1121 (quoting *Liparota* v. *United States*, *supra*, at 433). But we have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety. To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe

[2]Some courts interpreting the felony provisions of the CWA have used the public welfare doctrine to determine that a person may "knowingly" violate the statute even if he is not aware that he is violating the law. See, *e.g.*, *United States* v. *Weitzenhoff*, 35 F. 3d 1275, 1284–1286 (CA9 1993).

the Courts of Appeals invoke this narrow doctrine too readily, I would grant certiorari to further delineate its limits.